88-677

No. _____

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

DELBERT BOYLE, personal representative of the Heirs and Estate of David A. Boyle, deceased,

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX

LOUIS S. FRANECKE, ESQ.
JOHN O. MACK, ESQ.
MACK, HAZLEWOOD, FRANECKE & TINNEY
221 Pine Street, Suite 600
San Francisco, CA 94104
(415) 391-1560

MICHAEL MOORE, ESQ.
CARTWRIGHT, SUCHERMAN & SLOBODIN, INC.
101 California Street, 26th Floor
San Francisco, CA 94111
(415) 433-0440

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I.

QUESTIONS PRESENTED FOR REVIEW

1. In light of the conflicts and confusion in the various circuits regarding the factual tests of the Government Contractor Defense, first announced by this court *in this case* on June 27, 1988, what are the proper factual tests of the defense? Determination is necessary so that there is uniformity in the application of the Government Contractor Defense in all circuits.

2. Justice Scalia, writing for the majority in the previous decision in this case, remanded this case for factual evaluation of the "Government Contractor Defense" by the Fourth Circuit. Did the Fourth Circuit depart from the accepted and usual course of judicial proceedings by ignoring the jury's verdict, ignoring the conflicts of evidence and the mandate of this court, in finding that no reasonable jury could find for Petitioner on this defense as a matter of law?

3. Was Petitioner's constitutional right to trial by jury and non-review of the jury's findings by the appellate Court denied by the Fourth Circuit when they ignored conflicts of evidence, ignored Respondent's burdens of proof, and ignored the lack of evidentiary support for its reversal of the jury verdict in favor of Petitioner on the issue of the Government Contractor Defense?

4. Is the Fourth Circuit Court of Appeals' decision erroneous on its face with regard to its reasoning and findings regarding the factual and legal interpretations of the provisions of the Government Contractor Defense?

5. Was there sufficient evidence to support the jury verdict for Petitioner on the issue of the Government Contractor Defense and thus did the Fourth Circuit improperly depart from accepted and usual course of judicial proceedings by revesing the jury verdict as a matter of law?

6. Is the burden of proof of the Government Contractor Defense on the Defendant contractor (Respondent)?

7. There is confusion and ambiguity in the law to be applied to the Government contractor Defense's second requirement that the product comply with the specification; i.e.: is it a question of fact to be determined by the jury or is purchase by the government alone sufficient to establish conformity?

8. Does ignorant use of defective equipment by the government constitute "acceptance" of the defect?

9. Is it a jury question whether specifications are reasonably precise?

10. What are the factual tests for "governmental approval" of a design?

TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED FOR REVIEW	i
	TABLE OF CONTENTS	iii
	TABLE OF AUTHORITIES	vi
	PETITION FOR WRIT OF CERTIORARI	1
II.	OPINIONS BELOW	1
III.	JURISDICTION	4
IV.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
V.	STATEMENT OF THE CASE	4
	A. INTRODUCTION	4
	B. SUMMARY OF FACTS PERTAINING TO THE CONTROL SYSTEM DEFECT	5
	C. SUMMARY OF FACTS PERTAINING TO THE DEFECTIVE ESCAPE SYSTEM	8
VI.	REASONS FOR GRANTING THE WRIT	11
	A. THERE IS CONFUSION IN THE VARIOUS CIRCUITS REGARDING THE APPLICATION AND INTERPRETATIONS OF THE GOVERNMENT CONTRACTOR DEFENSE JUST ARTICULATED BY THIS COURT IN THIS CASE	11
	1. Introduction	11
	B. THERE IS CONFUSION IN THE APPLICATION OF THE BURDEN OF PROOF ON RESPONDENT CONTRACTOR TO PROVE THE GOVERNMENT CONTRACTOR DEFENSE	14
	C. THERE IS CONFUSION WHETHER THE CONTRACTOR MUST ESTABLISH THE THIRD PRONG OF THE GOVERNMENT CONTRACTOR DEFENSE OR IS IT FOR THE PLAINTIFFS TO DISPUTE IT	16

TABLE OF CONTENTS–Continued

Page

D. THERE IS CONFUSION AND AMBIGUITY IN THE LAW AND FACTS TO BE APPLIED TO THE GOVERNMENT CONTRACTOR DEFENSE'S SECOND REQUIREMENT THAT THE PRODUCT COMPLY WITH THE SPECIFICATIONS; i.e.: IS IT A QUESTION OF FACT TO BE DETERMINED BY THE JURY OR IS PURCHASE ALONE SUFFICIENT TO ESTABLISH CONFORMITY 19

1. Introduction 19

2. The control system did not conform to the specifications 20

3. The escape system did not conform to the specifications 22

E. THERE IS CONFUSION IN THE LOWER COURTS AS TO WHETHER IGNORANT USE OF THE EQUIPMENT BY THE GOVERNMENT CONSTITUTES ACCEPTANCE OF A PARTICULAR DEFECT ... 25

F. THERE IS CONFLICT AND CONFUSION IN THE LOWER COURTS AS TO WHAT AMOUNTS TO APPROVAL OF REASONABLY PRECISE SPECIFICATIONS ... 26

1. Introduction 26

2. Does "going back and forth" between the contractor and the government establish "approval"? 27

TABLE OF CONTENTS–Continued

Page

3. Is it a jury question if the specifications for the escape system are vague and imprecise 28

4. The "mock up" was not precise regarding the excape system such that a jury could find the burden of proof had been met 29

VII. PRAYER FOR RELIEF 30

VIII. APPENDIX TO PETITION FOR WRIT OF CERTIORARI A1

TABLE OF AUTHORITIES

Page

CASES

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, (PA 1962) 82 S.Ct. 780, 369 U.S. 355 19

Basham v. Pennsylvania Railroad Co., 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80 ..... 17, 20, 24

Boyle v. United Technologies Corp., 108 S.Ct. 2510 (1988) 2, 3, 11, 14, 16, 17

Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986) 2, 3

Campbell v. United States, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed.2d 428 17

Commercial Molasses Corp. v. New York Tank Barge, Co., 314 U.S. 104, 62 S.Ct. 156 15

Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986) 25

Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 17

Greyhound Corporation v. Lyon, (1939), 107 F.2d 157, cert. denied, 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014 22

Humes v. United States, 170 U.S. 210, 18 S. Ct. 602, 42 L.Ed. 1011 24

In re Agent Orange 534 F. Supp. 1055 (E.D.N.Y. 1982), cert. denied, 465 U.S. 1067 25

In re Air Crash Disaster at Manheim, Germany, 769 F.2d 115 (3rd Cir. 1985) 14, 25

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 30

TABLE OF AUTHORITIES–Continued

Page

Koutsoubos v. Boeing Company, 755 F.2d 352 (3rd Cir. 1985) 14, 27, 28

McKay v. Rockwell International Corp., 704 F.2d 444 (9th Cir. 1983), cert. denied 464 U.S. 1043 (1984), 104 S.Ct. 711, 79 L.Ed.2d 175 (1984) 11, 14

Moore v. Chesapeake & O. Railway Co., 71 S.Ct. 428, 340 U.S. 573, 95 L.Ed. 547 29

Schoenborn v. Boeing Company, 586 F.Supp. 711 (E.D. Pa. 1984) 14

Selma R & D R. Company v. United States, 139 U.S. 560, 11 S.Ct. 638 17

Seven Provinces Insurance Company Limited v. Commerce & Industry Insurance Co. (D.C. Missouri, 1975) 65 F.R.D. 674 15

Shaw v. Grumman Aerospace Corporation, 778 F.2d 736 (11th Cir. 1985) 14, 25

Southwestern Brewery and Ice Company v. Schmidt, 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170 24

Taylor v. Mississippi, 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600 ..... 20, 24

Tillett v. J I Case Company, 756 F.2d 591 (7th Cir. 1985) 14

United States v. New York, N.H.N.H.R. Co., 655 U.S. 253, 78 S.Ct. 212 17

OTHER AUTHORITIES

28 U.S.C. Section 1254(1) 4

U.S. Const. Seventh Amendment 4

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on or about May 27, 1986 and pursuant to remand by this court, the further opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on or about August 13, 1988.

II.

OPINIONS BELOW

Petitioner's decedent, a United States Marine Helicopter Co-Pilot, was riding in a CH-53D HELICOPTER built by Respondent, SIKORSKY CORPORATION DIVISION OF UNITED TECHNOLOGIES CORPORATION, when the aircraft made an uncontrollable right turn at low altitude, crashing a mile and a half off the Virginia Beach shore, Virginia, on April 27, 1983. The pilot, crew chief and passenger escaped, but Petitioner's decedent, co-pilot, drowned in the helicopter when it sank.

Suit was brought in United States District Court for the Eastern District of Virginia at Richmond on the basis that the situs of the accident was within the 3 mile limit of the Virginia coast and on diversity of citizenship.

It was stipulated that Virginia substantive law applied.

At the conclusion of testimony, the District Court denied Respondent's Motion for directed verdict on all

issues as there were facts to be resolved by this jury. (T.T. 598-599).[1]

The jury was charged with an instruction very similar, if not identical in meaning, to the Government Contractor Defense first announced by this court on June 27, 1988. See 108 S. Ct. 2510 (1988) (J.A.461).

On July 24, 1985, judgment was entered in the United States District Court, Eastern District of Virginia, Richmond Division, by jury verdict, in favor of Petitioner in amounts totalling $725,000 and is reprinted in the Appendix to Petition for Writ of Certiorari, page A1.

On September 10, 1985, the District Court denied Respondent's Motion for Judgment Notwithstanding the Verdict because "there was substantial factual and expert testimony that seemed to me to present issues of fact to be resolved by a jury . . . " (M.T. 43).

On May 27, 1986, the United States Court of Appeals for the Fourth Circuit reversed this jury verdict and remanded with directions to enter Judgment for Respondent, 792 F.2d 413 (4th Cir. 1986). The opinion is reprinted in reprinted in the Appendix to the Petition for Writ of Certiorari, page A2.

Petitoner's timely Petition for Rehearing In Banc to the Fourth Circuit Court of Appeals was denied on June 25, 1986, and is reprinted in the Appendix to Petition for Writ of Certiorari, page A24.

---

[1] T. T. refers to trial transcript and J. A. refers to Joint appendix of the previous hearing before this Court.

Thereafter, the United States District Court for the Eastern District of Virginia vacated its judgment and entered judgment for Respondent on July 7, 1986, which is reprinted in the Appendix to Petition for Writ of Certiorari, page A25.

Certiorari was granted by this United States Supreme Court on June 12, 1987. Oral argument was heard on October 13, 1987 and re-argument on April 27, 1988.

This United States Supreme Court then decided certain aspects of this case on June 27, 1988, see *108 S. Ct. 2510; 88 CDOS 4562 (1988).* This Court remanded the case for further proceedings before the Fourth Circuit in conformance with its opinion for the Fourth Circuit to clarify its factual interpretation of the "Government Contractor Defense". This opinion and the dissenting opinions are reprinted in the appendix to this Petition, page A10.

The Fourth Circuit Court of Appeals then issued its unpublished further opinion, which is undated, but which was received by the offices of counsel for Petitioner, on or about August 13, 1988 and is reprinted in the Appendix of this Petition, page A49.

The *total reasoning* of the Fourth Circuit reversing the jury's verdict as a matter of law appears in 792 F.2d 414-415 (Appendix A, A3). Their *restatement* that this is their total reasoning is in their further undated opinion in light of this Supreme Court's remand which appears in Appendix A, A51.

It is the Fourth Circuit reasoning, which is erroneous, contradictory, and which must be clarified by this

Supreme Court if the Government Contractor Defense is to be applied properly by the various circuits.

III.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitution of the United States, Seventh Amendment, right to trial by jury:

> "In suits at common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, and according to the rules of the Common Law".

V.

STATEMENT OF THE CASE

A.

INTRODUCTION

Petitioner's decedent, a United States Marine helicopter co-pilot, was riding in a CH-53D Helicopter built by Defendant, SIKORSKY CORPORATION DIVISION OF UNITED TECHNOLOGIES CORPORATION, when the aircraft made an uncontrollable right turn at low altitude crashing approximately a mile and a half off the Virginia Beach shore, Virginia, on April 27, 1983. The pilot, crew

chief and passenger escaped, but Petitioner's decedent, co-pilot, drowned in the helicopter as it sank.

Suit was brought in United States District Court for the Eastern District of Virginia at Richmond on the basis that the situs of the accident was within the the 3 mile limit of the Virginia coast and on diversity of citizenship grounds. It was agreed that Virginia substantive law applied.

Petitioner generally contended that decedent died because of three causes:

> *First,* Defendant had negligently repaired a part of the control system of the helicopter which proximately caused the helicopter to go out of control and crash into the sea; and
>
> *Second,* the helicopter control system was defective in design and did not conform to the U.S. Navy's specifications; and
>
> *Third,* the co-pilot escape system was defectively designed in that the escape handle could not be reached; the escape window, which only opens out, would not open due to sea pressure holding it shut while the helicopter was sinking and thus the escape system did not conform to the U.S. Navy's specifications.

For purposes of this Petition, the second and third general contentions are applicable with regard to the Fourth Circuit's findings under the Government Contractor Defense.

B.

SUMMARY OF FACTS PERTAINING TO THE CONTROL SYSTEM DEFECT.

The Automatic Flight Control System (AFCS) (or auto-pilot) on the subject helicopter acts like power

steering on an automobile. When the power steering went awry, the pilot was forced into an uncontrolled condition where the power steering was working against his efforts to control the helicopter.

During the beginning of the procurement process the government required in "Detailed Specifications for Model CH-53D Helicopter", prepared by the Department of the Navy, paragraph 3.10.3.1 – "Basic Automatic Flight Control System" (AFCS):

> "An AFCS shall be provided in accordance with a *contractor* prepared specification . . . " (Emphasis added) (J.A. 493).[2]

The Government also required per Military Specification, MIL-C-18244A, 1 December 1962, paragraph 3.1.1.3.6. "Over power":

> "With the automatic flight control system engaged and operating, it *shall be possible to manually overpower* or countermand the control action of the system . . . " (R.T. 391, J.A. 490).

Further in paragraph 3.1.1.3.10 "Control Stick . . . Maneuvering":

> "This *manuevering capability shall be possible at any time* when the automatic flight control system is engaged by using the normal aircraft controls." (J.A. 491).

The Respondent had the responsibility to design the system and prepare the specifications. Respondent accepted that responsibility (J.A. 494, 497).

---

[2] R.T. refers to Reporter's Transcript of Trial Proceedings.

The Respondent then stated to the govenment in "Automatic Flight Control System (AFCS) Detailed Specification", 4, *prepared by Respondent,* paragraph 3.3.1.6– "Override Provision"–:

> "All of the channels of the AFCS have differential inputs and *may be overridden by the pilot without disengagement* of the system or damage to the system regardless of the signal levels in the controls." (Emphasis added)(J.A. 478).

That was a specific statement by Respondent that the system can be overridden.

The Government accepted this statement by Respondents. Further in paragraph 3.3.1.6.1 – "Override Forces", the Respondent also stated to the Government that:

> "The override forces shall not exceed the following values in the worst malfunction of the AFCS . . . " (Emphasis added) (J.A. 478).

There is then no specification by Respondent of the override forces for the "roll servo" involved in this case. The U.S. Navy was assured by Respondents that the system could be overriden by the pilot. Tragically, as this case proved, it could not.

In the Purchase Contract, for the Ch-53D Helicopters, paragraph F-9 entitled, "Design Responsibility" the Government states:

> "In releasing design data or drawings, or in releasing aircraft for flight, the government accepts no responsibility for the successful operation of the equipment manufactured by the contractor" (J.A. 495, 498).

Respondent accepted this responsibility.

The specifications for the AFCS, prepared by Respondent were the only presentation to the Government on this subject. These specifications failed to inform the Government about the worst case malfunction of the "roll servo" (J.A. 263-265, 478).

The testimony a trial showed that the actual amount of force necessary to override the "roll servo" was approximately fifty-five (55) pounds or almost twice as much as any of the other systems (J.A. 261, 264-265, 380-382, 476, 499).

The fifty-five (55) pound override force was determined by Respondent only *after* the crash (J.A. 476-499).

In summary, the facts established a *misinformed government* and a defect in the equipment which *did not* conform to the Specifications.

C.

SUMMARY OF FACTS PERTAINING TO THE DEFECTIVE ESCAPE SYSTEM

The helicopter after crashing into the water, while sinking rapidly, rolled left (toward co-Pilot's side) (J.A. 127). The co-pilot's escape window only opens out, not in, and could not be opened against the sea water pressure (J.A. 473, 481, 482, 583).

The "Detailed Specifications for Model Ch-53D Helicopter", *prepared by the Department of the Navy* for Respondent, paragraph 3.7.1.7. – "Emergency Escape" says:

> "Emergency escape shall be provided for pilot and co-pilot through both cockpit side windows which shall be *readily jettisonable*. Both internal and external

> handles shall be provided to actuate the release mechanism . . . (Emphais added) (J.A. 493).

The Department of the Navy–"Special Specifications for Design and Construction of Aircraft Weapon Systems", March 1959–paragraph 3.7.1.7.1–"Manual Escape Exits says:

> "Manual escape exits shall be provided as necessary to permit *ready and safe egress* of rotary wing aircraft occupants *in an emergency*. All hatchs, doors, windows, or ports, which are to be used as emergency escape exits, *shall be quick opening, easily operable, and shall be jettisonable when in the fully closed position,* the fully open position, and in any intermediate position between fully closed and fully open" (J.A. 492). (Emphasis added).

These U.S. Navy specifications are not reasonably precise and it is left to the contractor to prepare the design to accomplish this purpose.

When the aircraft rolled, it rolled left, or toward the co-pilot (J.A. 127). This put the escape window under water and non-usable due to water pressure. This design did not conform to the Navy specifications for a *readily jettisonable escape system under all conditions* (J.A. 492, 493).

The stipulated facts also show that the water was murky with visibility of only three feet (J.A. 78-80). The surviving crew members testified that it was by sheer luck that they were able to get themselves out in the very disorienting murky water after the helicopter had rolled over (J.A. 128-129, 180-181).

Decedent had attempted to escape during the actual sinking of the helicopter. He had disconnected his seat belt and shoulder harness and had suffered lacerations

on his left hand that correspond to attempts to find the escape control handle in the brown, murky water where visibility was only three feet (J.A. 78-80); PL. EX. 1; R.T. 391).

There was *no testimony by Respondent* of any test, any reports, any specifications or any dialogue between Respondent and the U.S. Navy that the co-pilot escape window would not open while the aircraft was sinking and the window was held in place by water pressure. The record is totally devoid of any dialogue between Respondent and the U.S. Navy regarding this condition.

There was *no testimony by Respondent* that they knew or didn't know about this phenomenon, indeed, even that they acknowledged its existence.

There was *no testimony by Respondent* that this phenomenon was demonstrated to the U.S. Navy or that the Navy knew about it.

Additionally when the collective is pulled full up, it blocks the co-pilot's access to his only escape hatch handle (J.A. 220-221, 475). The pilot testified he had pulled the collective full up just prior to impact, blocking access to the co-pilot's escape control handle as shown by Petitioner's witnesses' testimony and photographic exhibits (J.A. 119, 220-221, 234, 475). The pilot's on the other hand, is not so blocked.

The blockage of the escape control handle by the collective does not conform to the Navy's specification for "ready egress" nor "easily operable". This was testified to by Petitioner's expert engineer, Dr. James Hayes. (J.A. 237-238)

In summary, *Respondent failed to prove* the elements of the Government Contractor Defense.

VI.

REASONS FOR GRANTING THE WRIT.

A.

THERE IS CONFUSION IN THE VARIOUS CIRCUITS REGARDING THE APPLICATION AND INTERPRETATIONS OF THE GOVERNMENT CONTRACTOR DEFENSE JUST ARTICULATED BY THIS COURT IN THIS CASE.

1. Introduction

There is conflict and confusion in the lower Courts (as explained below) regarding the application and interpretations of the standards of fact and law regarding the Government Contractor Defense announced by this Court in this case on June 27, 1988. It is the purpose of this Petition to point out the various conflicts and the confusion as illustrated in this case.

It is only fitting that since this case set the landmark "Government Contractor Defense" in place, that this case also set the parameters of its application.

This Supreme Court has stated in this case, *Boyle vs. United Technologies*, 108 S. Ct. 2510, 2518 (1988) that the Government Contractor Defense is as was first articulated by the Ninth Circuit in *McKay vs. Rockwell International Corporation*, 704 F.2d 444 (9th Circuit, 1983), cert. denied 464 U.S. 1043, 104 S. Ct. 711, 79 L.Ed.2d 175 (1984):

> "liability for design defects in military equipment cannot be imposed, pursuant to State Law, where (1)

> The United States approved reasonably precise specifications; (2) The equipment conformed to those specifications; and (3) The supplier warned the United States about dangers in the use of the equipment that were known to the supplier, but not to the United States . . . ."
>
> "the first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – i.e., *they assure that the design feature in question was considered by a government officer,* and not merely by the contractor itself. The third condition is necessary because, in it's absence, the displacement of State Tort Law would create some incentive for the manufacturer to withold knowledge of risks, since conveying that knowledge might disrupt the contract but witholding it would produce liability." (A22)

In this case, as explained below, *the Fourth Circuit Court of Appeals, on remand, has departed from this reasoning and the purpose* of the Government Contractor Defense in holding that no reasonable jury could find for Petitioner on this issue.

Actually, the jury was charged with a form of the Government Contractor Defense *essentially similar* to that articulated by this Court.

The jury charge stated:

> "In addition, the Plaintiff cannot recover under either a theory of negligence or breach of implied warranty based upon a design defect if Defendant, U.T.C., *proves by a preponderance of the evidence* these three things. 1, That the United States Navy established or approved the specifications for the co-pilot egress system; and 2 that the helicopter conformed to the specifications; and 3 that the United States Navy knew as much, or more than the Defendant about the helicopters hazards and therefore Defendant did not

need to warn the Government of the dangers involved in the use of the equipment.

It is not necessary for the Defendant, U.T.C., to prove that the Government established every exact detail of the egress system. However, the Defendant must prove by a preponderance of the evidence that the United States Navy Specifications were more than just general requirements or that the Navy examined or agreed to a detailed description of the system." (J.A. 461).

Prior to giving this jury charge, the trial judge denied Defendant's Motion for Directed Verdict on all issues *as there were facts needed to be resolved by the jury.* (R.T. 595-599).

And further, the same District Court Judge denied Respondent's Motion for Judgment notwithstanding the verdict, because *"there were substantial factual and expert testimony that seemed to me to present issues of fact to be resolved by a jury. . . ."* (M.T. 43).[3]

The Fourth Circuit, in violation of Petitioner's Seventh Amendment right contradicted not only the jury but the District Court Judge and found, *as a matter of law,* that the jury was wrong even though the jury had established the facts as shown below.

---

[3] M.T. refers to Motion for New Trial, Reporter's Transcript of Proceedings.

B.

THERE IS CONFUSION IN THE *APPLICATION* OF THE BURDEN OF PROOF ON RESPONDENT CONTRACTOR TO PROVE THE GOVERNMENT CONTRACTOR DEFENSE.

Justice Scalia, writing for the majority in this case, made clear that "whether the facts establish the conditions for the defense is a question for the jury." *Boyle vs. UTC*, 108 S. Ct. 2510, 2519 (1988).

However, *nowhere does this Court's opinion confirm or deny that the burden of proving the defense is on the contractor defendant* (Respondent herein).

All the circuits which have adopted the Government Contractor Defense have agreed that the defense is a jury question and that the *Burden of Proof* is on the Defendant. *Koutsoubos vs. Boeing Co.*, 755 F.2d 352 (3rd Cir. 1985), *In re Air Crash Disaster at Manheim, Germany*, 769 F.2d 115 (3rd Cir. 1985), *McKay vs. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *Tillett vs. J I Case Company*, 756 F.2d 591 (7th Cir. 1985), *Schoenborn vs. Boeing Company*, 586 F. Supp. 711 (E.D. Pa. 1984), *Shaw vs. Grumman*, 778 F.2d 736 (11th Cir. 1985).

The issue of who has the Burden of Proof must be determined by this Court or else the defense can not be properly determined by the jury. Further, as illustrated in this case, Respondent's failure to meet their Burden of Proof clearly supports the jury's determinations contrary to the Fourth Circuit's opinion.

Respondent fails if they fail to prove any one of the three elements of the defense.

If the contractor, (Respondent herein), fails to meet its burden of presentation of sufficient evidence to preponderate or fails to factually connect the evidence, or there is conflict in the evidence, then a reasonable jury can conclude that the contractor has not met its Burden of Proof and find against the contractor. See *Commercial Molasses Corp. vs. New York Tank Barge, Co.*, 314 U.S. 104, 62 S. Ct. 156.

Yet, as explained below, *the Fourth Circuit has completely disregarded who has the Burden of Proof* and what the factual tests are, in its conclusion that no reasonable jury could find for Petitioner. The Fourth Circuit has completely departed from the usual and accepted course of judicial procedure by ignoring conflicts in evidence and not requiring the Respondent to even raise minimum factual evidence before reversing the jury verdict for Petitioner, *as a matter of law.* (A3)

It has always been the law that appellate courts, in determining whether there was substantial evidence to support a jury verdict, must apply the following standards to review the evidence: (1) As tending to support the jury's verdict, (2) in a light most favorable to the findings of the jury, and (3) with the party having the verdict being given benefit of every favorable inference reasonably justified by the evidence. *Seven Provinces Insurance Company Limited vs. Commerce & Industry Insurance Co.* (D.C. Missouri, 1975) 65 F.R.D. 674.

The Fourth Circuit failed to apply these standards as explained in the following sections of this Petition.

C.

THERE IS CONFUSION WHETHER THE CONTRACTOR MUST ESTABLISH THE THIRD PRONG OF THE GOVERNMENT CONTRACTOR DEFENSE OR MUST PLAINTIFFS DISPUTE IT.

As illustrated in this case, the most glaring and patent error by the Fourth Circuit Court of Appeals appears in their reasoning in support of the third prong of the defense requiring warnings by the contractor to the Government. The Fourth Circuit only said:

> "Plaintiffs point to nothing in the record that indicates that there were any hazards of which Sikorsky was aware and the Navy was not. Sikorsky's duty to warn the Navy of any hazards known to it but not to the Navy was thus not brought into question" (A6).

The Fourth Circuit has thus totally misconstrued the burden of the defense which requires that "the *supplier* warn the United States about dangers in the use of the equipment that were known to the supplier, but not to the United States." *Boyle*, supra, p.2518.

It is Respondent's burden to bring forth evidence showing either (1) they had no knowledge themselves of the dangers in the use of the escape system and therefore did not need to warn the Government, or (2), that the United States knew about the dangers in the use of which the contractor (Respondent) was also aware, or (3) that Respondent had no knowledge of the danger in the use and neither did the Navy. However, Respondent offered absolutely no evidence or testimony on this point.

This Court must clearly spell out that contractors have the Burden of Proof on all three prongs of the defense.

A litigant does not ordinarily have the burden of establishing facts peculiarly within the knowledge of his adversary. *United States vs. New York, N.H.NH.R. Co.*, 655 U.S. 253, 78 S.Ct. 212. That is, the Burden of Proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant. *Selma R & D. R. Company vs. United States*, 139 U.S. 560, 11 S.Ct. 638; *Campbell vs. United States*, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed. 2d 428.

The appellate court's function is exhausted *when the evidentiary basis of the verdict becomes apparent, it being immaterial that the court might draw contrary inference or feel that another conclusion is more reasonable. Basham vs. Pennsylvania Railroad Co.*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed. 2d 80. An appellate court may not impeach the verdict by differing from the jury in equally reasonable views of a witness's meanings, or, because judges feel that other results are more reasonable. See *Gallick vs. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618. The burden is upon Respondent to prove this third element of the defense.

The record is totally devoid of any testimony by any witness, including Sikorsky and the Navy, on the issue of was there or wasn't there any awareness of the dangers in the use of the escape system or the "roll servo".

There was *no testimony* which stated that *Sikorsky* was or was not aware of these dangers.

Nor, was there one shred of testimony by the Navy or Sikorsky that the *Navy* was or was not aware of these defects or dangers in the use of the equipment.

No witness for Sikorsky said "We never knew about this danger when we were designing and selling this product to the Navy" and no Navy personnel testified "We already knew about this danger and we accepted it". *This is a critical failure of proof.*

This is a factual failure to meet the Burden of Proof such that a reasonable jury could conclude, contrary to the Fourth Circuit Opinion, that Respondent had not met their burden of proving warnings or lack of knowledge under the third prong of the Government Contractor Defense.

Respondent never even raised the third prong of the defense!

There is thus error on its face in the reasoning by the Fourth Circuit in stating that Sikorsky's "duty to warn was thus not brought into question". The Burden of Proof requires that the question is already raised. Respondent has to meet it. They did not. Thus this Court should clearly set out the standard for the Burden of Proof and reverse the Fourth Circuit for its reasoning.

Under the Seventh Amendment to the Federal Constitution: "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law." Neither the United States Supreme Court nor United States Court of Appeals can redetermine facts found by a jury any more than a United States District Court can pre-determine them.

Atlantic & Gulf Stevedores Inc. vs. Ellerman Lines, Limited, 369 U.S. 355 82 S.Ct. 780, 7 L.Ed.2d 798.

D.

THERE IS CONFUSION AND AMBIGUITY IN THE LAW AND FACTS TO BE APPLIED TO THE SECOND REQUIREMENT OF THE GOVERNMENT-CONTRACTOR DEFENSE THAT THE PRODUCT COMPLY WITH THE SPECIFICATIONS; i.e.: IS IT A QUESTION OF FACT TO BE DETERMINED BY THE JURY OR IS PURCHASE ALONE SUFFICIENT TO ESTABLISH CONFORMITY.

1.

Introduction

Petitioner alleges that the second error is the Fourth Circuit's interpretation of the second prong of the defense:

> "Sikorsky then built the helicopter, and in 1970 the Navy accepted it as fully complying with specifications." (A6)

The Fourth Circuit makes no other reference with regard to Sikorsky's Burden of Proof re the second prong of the defense, that "the equipment conformed to the specifications." *Boyle,* supra, p.2518.

However, this Supreme Court seems to have formulated an *objective factual test* of the conformity of the equipment to the specifications, which is not satisfied by the Navy's mere acceptance of the equipment, i.e., it is a jury question to determine whether or not the second prong of the particular defense has in fact been met. It may be that the equipment does not, as in this case, meet

the specifications when reviewed *after the fact* of acceptance.

On this issue, a great deal of *conflicting evidence* was presented at trial with regard to the provisions of the specifications and whether or not the equipment conformed to the specifications. (See J.A. 29-78, 235, 237-238, 244, 256-265). A Court of Appeals can not overturn a jury verdict when there is conflicting evidence on the issue. See *Taylor vs. Mississippi*, 319 U.S. 583, 63 S. Ct. 1200, 87 L.Ed. 1600; *Basham vs. Pennsylvania Railroad Co.*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80.

2.

The Control System Did Not Conform To The Specifications.

As illustrated below, both the control system and escape system failed to conform to the specifications even though the Navy accepted the equipment.

There was conflict in the evidence, such that a reasonable jury could easily and specifically conclude that the control system of the subject helicopter did not conform to the specifications. (J.A. 256-265)

However, the Fourth Circuit reasoned that since the Navy had accepted the helicopter, that it therefore was in conformance with the specifications. (A6).

This Court must state unequivocably that conformance to the specifications is a jury question and that acceptance by the military is only one factor that the jury may consider in its determination of the question.

This case illustrates the problem, very clearly.

The Military Specifications, applicable to the Central System, paragraph 3.1.1.3.6 "Overpower", require that with the control system engaged and operating, it shall be possible to manually overpower or countermand the control action of the system (J.A. 490).

This was to be at all times.

Respondent stated to the government in "Automatic Flight Control System" (AFCS) the Detailed specifications prepared by Respondent, paragraph 3.3.1.6 - "Override Provisions":

> "All of the channels of the AFCS have differential inputs and *may be overidden by the pilot without disengagement of the system . . .* " (emphasis added) (J.A. 478).

A specific statement by respondents that the system can be overridden. Yet further on at paragraph 3.3.1.6.1 "Override forces":

> "The override forces shall not exceed the following values in the worst malfunction of the AFCS" (J.A. 478).

There is then no statement as to what those override forces are for the "roll servo" involved in this case.

Tragically, through testimony, including live testimony and documents, it was shown that Respondent, only after the crash here, tested the control system and found that the amount of force was approximately 55 pounds or almost twice as much as any of the other systems. (J.A. 261, 264-265, 380-382, 476, 499).

The pilot of the crashed helicopter testified that he was unable to control the system when he was trying, as

hard as he could, to push the control stick back to regain control of the helicopter. (J.A. 116-117).

Thus it is a reasonable conclusion by the jury that, Respondent's burden of proof had not been met and that the equipment itself did not conform to the specifications that were specifically stated by Respondent to the United States Navy.

Yet, the Fourth Circuit said, *as a matter of law*, that no reasonable jury could conclude this way, since the United States navy had accepted the helicopter. Clearly, the helicopter *did not conform to the specifications*.

It makes no sense to say that the second prong of the test is met if the government only buys the product; the product itself must actually conform.

Thus, this Supreme Court must decide whether or not the second prong of the Government Contractor Defense is a question of fact or subjective standard as to conformance with the specifications.

3.

The Escape System Did Not Conform To The Specifications.

Petitioner's expert Doctor of Engineering, Dr. James Hayes, testified at length regarding the specifications for the escape system and whether the helicopter, as built, conformed to them. (J.A. 235, 237-238, 244). He testified that they did not.

Courts of Appeal cannot disturb a verdict based on conflicting evidence. *Greyhound Corporation vs. Lyon* (1939) 107 F.2d 157, cert. denied 60 S. Ct. 592, 309 U.S.

667, 84 L.Ed. 1014. Yet, the Fourth Circuit did reverse, despite conflicts in this evidence.

Also, it would make no sense that acceptance of a "latent defect not conforming to a specification" by the government would meet this second prong. *That is like saying, ignorance in acceptance is then knowledgable acceptance.* It isn't logical.

If purchase by the government alone constitutes conformance to specifications the second prong of the defense is meaningless, since in every case of this type the equipment will have been purchased by the government. This Court must resolve this confusion.

Further, the escape system specifications themselves are *vague* with regard to the type of equipment required and the manner in which the design is to be accomplished. It would seem to be a jury question to determine whether or not those specifications, (1), are reasonably precise and, (2), whether or not the equipment then conformed to those specifications if they are, in fact, vague as they are here.

The helicopter, after crashing into the water, while sinking rapidly, rolled left (toward co-pilot's side) (J.A. 127). The co-pilot's escape window only opens out, not in, and could not have been opened against the sea water (J.A. 473, 481-482, 583).

In "Detailed Specifications for Model CH-53D Helicopter", prepared by the Department of the Navy, paragraph 3.7.1.7–"Emergency Escape":

> "Emergency escape shall be provided for pilot and co-pilot through both cockpit side windows which shall be readily jettisonable. Both internal and

> external handles shall be provided to actuate the release mechanism . . . " (Emphasis added) (J.A. 493).

The Department of the Navy –"Special Specifications for Design and Construction of Aircraft Weapon Systems", March 1959–paragraph 3.7.1.7.1–"Manual Escape Exits":

> "Manual escape exits shall be provided as necessary to permit ready and safe egress of rotary wing aircraft occupants in an emergency. All hatches doors, windows, or ports, which are to be used as emergency escape exits, shall be quick opening, easily operable, and shall be jettisonable when in the fully closed position, the fully open position, and in any intermediate position between fully closed and fully open . . . " (J.A. 492).

Thus, the U.S. Navy's specifications are most general and it is left to the contractor to prepare the design.

With the substantial conflict in evidence that was presented, conflicts in the evidence should be deemed on appeal to have been resolved by the jury in favor of the prevailing party. *Taylor vs. Mississippi*, 319 U.S. 583, 63 S. Ct. 1200, 87 L.Ed. 1600. It matters not that the Court of Appeals might draw a contrary inference or feel that another conclusion is more reasonable. *Basham vs. Pennsylvania Railroad Co.*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed. 2d 80. The Fourth Circuit did not follow this usual course of judicial procedure.

Nor can Respondent argue that the verdict was against the weight of the evidence since this Supreme Court cannot consider the weight if there was any proper evidence to go to the jury in support of the verdict. See *Humes vs. United States*, 170 U.S. 210, 18 S.Ct. 602, 42 L.Ed. 1011; *SouthWestern Brewery and Ice Company vs. Schmidt*, 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170.

E.

THERE IS CONFUSION IN THE LOWER COURTS AS TO WHETHER IGNORANT USE OF THE EQUIPMENT BY THE GOVERNMENT CONSTITUTES ACCEPTANCE OF A PARTICULAR DEFECT.

There is confusion in the lower courts with regard to the question of experience over periods of years by the government in the use of certain equipment and how that may relate to the defense. Several courts (including the Fourth Circuit) have felt that a period of years would amount to an "approval of the design". However, these courts do not explain if knowing approval of the design is the same thing as use of a design, *unknowingly*, i.e.: a defect which may be latent, until some tragic time in the future. See: *Dowd vs. Textron, Inc.* 792 F.2d 409, 412; *In re Air Crash Disaster at Manheim, Germany*, 769 F.2d 115 (3rd Cir. 1985); *In re Agent Orange Product Liability Litigation*, 534 F.Supp. 1055 (E.D.N.Y. 1982), cert. denied, 465 U.S. 1067; *Shaw vs. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985).

Here, the Fourth Circuit only says "the Navy thus had thirteen years of experience with the particular helicopter at the time of Boyle's Crash." (A6)

Yet, there was no testimony that in those thirteen years, there had been any experience by the Navy that a similar crash had taken place causing them to become aware of the fact that the escape hatch or system does not work, when held in place by water pressure.

Also, not one Navy man so much as testified "Yes, we were aware of the danger in the use of the escape system."

The point is again that there is no evidence before the jury to infer or connect experience by the Navy with regard to the use of this equipment and that they then became aware of the actual dangers in the use. *This amounts to a failure of proof* such that a reasonable jury could find against Respondent, contrary to the Fourth Circuit's interpretation.

The extreme finding by the Fourth Circuit that no reasonable jury could find for Petitioner, ignored the failure of proof which supported the jury's finding, when the burden of proof is on Respondent to bring forth such evidence. The absence of any connecting evidence to the specific point is thus within the realm of the jury to find that Respondent did not meet its burden of proof.

The Supreme Court must determine the standard by which the Government contractor defense is to be established and if ignorant use of a product for a period of years is a proper standard for "acceptance of the defect" without other evidence.

F.

THERE IS CONFLICT AND CONFUSION IN THE LOWER COURTS AS TO WHAT AMOUNTS TO APPROVAL OF REASONABLY PRECISE SPECIFICATIONS.

1.

Introduction

There is also conflict and confusion with regard to the first prong of the defense as to the *standard of fact* to establish approval of reasonably precise specifications for the equipment. Some of them are:

1. Does going back and forth in discussions between the government and the contractor without testimony indicating that the going back and forth in discussions pertained to the defect in question, establish approval? See *Koutsoubos vs. Boeing Company*, 755 F.2d 352 (3rd Cir. 1985).

2. Is it a jury question as to whether or not specifications are reasonably precise with regard to the specific design?

3. Is review of a mock up which was not testified to be a working model or a model demonstrating the actual defect in question sufficient?

4. Is testimony necessary to establish what a signature of approval of specifications by a government person actually means? *Boyle vs. UTC*, 108 S.Ct. 2510, 2518 (1988).

2.

Does "Going Back And Forth" Between The Contractor And The Government Establish "Approval"?

Here, the Fourth Circuit reasoned that:

> "Sikorsky and the Navy worked together to prepare detailed specifications for the CH-53 Helicopter. One of the Sikorsky program engineer managers for the CH-53 described in some detail the back and forth discussions between Sikorsky and the Navy. We have previously said that this type of exchange of information will normally suffice to establish government approval of the design in question." (A6)

Unfortunately, *the Fourth Circuit at that point does not make the one evidentiary connection that it must make* in

order to find that no jury could possibly find for Petitioner. That is, *that the going back and forth in discussions, in fact, addressed the specific defects in question.* Other circuits have also made this error regarding this point. See *Koutsoubos vs. Boeing Company,* 755 F.2d 352 (3rd Cir. 1985).

This Court must state that the going back and forth must actually address the issue of the specific defect.

Here again, there was no testimony from any source; the Navy or anywhere that the specific defects of the escape hatch in question were a topic of discussion with regard to this back and forth. Respondent's testimony made only the *most general* references with regard to the overall procedure that is followed when dealing with military procurement. (J.A. 284-293) There was no testimony about discussions regarding the specific defects in the escape hatch.

Thus again a failure of proof on the part of Respondent A reasonable jury could conclude that, since Respondent had the burden of proving the actual discussions pertained to the defect, Respondent failed to meet it's burden of proof.

3.

Is It A Jury Question If The Specifications For The Escape System Are Vague And Imprecise?

The question of the reasonable precision of the specifications themselves is also clearly a jury question. Even a simple reading of the various specifications that were involved in this case makes it clear that they are vague and only most general in nature. (supra). A reasonable

jury could find them to be imprecise for this particular item of equipment.

Yet, the Fourth Circuit found, as a matter of law, that no reasonable jury could find the: "Specifications" imprecise. This Supreme Court must determine the standard of *factual* review of this jury question.

4.

The "Mock-Up" Was Not Precise Regarding The Escape System Such That A Jury Could Find The Burden Of Proof Had Been Met.

The Fourth Circuit reasoned that approval of a mock-up of the cockpit showed approval. (A6)

However, the court and testimony again specifically fails to connect the actual defects or dangers in the use complained of versus the burden of proving it to be on the mock-up in the first place. *The record is devoid of any pictures, drawings, photographs, or anything* other than the simple statement by the witness of an alleged wooden mock-up being presented to the Navy. (J.A. 301)

The point is that there was *no testimony as to how or if the escape hatches were shown in a working configuration;* was there glass in place and was it obvious how the hatches work or function under the extreme conditions of its sinking in the water. There was no reference to any glass being in place where these "hatches" might or might not have been located. Speculation cannot supply the place of proof. *Moore vs. Chesapeake & O. Railway Co.* 71 S.Ct. 428, 340 U.S. 573, 95 L.Ed. 547.

The jury had no opportunity to review any substantial evidence of what was actually being shown to the

Navy regarding this "mock-up", so that it could judge for itself whether or not there was in fact a presentation of the actual defect or danger in the use involved.

Failing to show a photograph or anything regarding the mock-up is a fatal error. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been *adverse. Interstate Circuit, Inc. vs. United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610.

Many other analyses regarding these materially important issues will be presented should this Court agree to hear this case.

PRAYER FOR RELIEF

Petitioner respectfully requests to be heard before this honorable Court and for this court to reverse the Fourth Circuit and reinstate the jury verdict.

Respectfully submitted,

Louis S. Franecke, Esq.
Mack, Hazlewood, Franecke
& Tinney

APPENDIX

JUDGMENT IN A CIVIL CASE
(Filed July 24, 1985)
UNITED STATES DISTRICT COURT

District–
Eastern District of Virginia–Richmond Division

Docket Number–
Civil Action No. 84-0486-R

Name of Judge or Magistrate–
Richard L. Williams, U.S. District Judge

Case Title–

DELBERT BOYLE, etc.,

Plaintiff,

v.

UNITED TECHNOLOGIES CORPORATION

Defendant.

[x] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, DELBERT BOYLE, personal representative of the Heirs and Estate of David A. Boyle, deceased, recover of the defendant, UNITED TECHNOLOGIES CORPORATION, the sum of SEVEN HUNDRED TWENTY-FIVE THOUSAND AND NO/100 DOLLARS ($725,000.00) with legal

interest thereon at the rate of 7.60% per annum, until paid, and his costs of action. It is further ORDERED and ADJUDGED that the plaintiff, DELBERT BOYLE, personal representative of the Heirs and Estate of David A. Boyle, deceased, shall distribute this amount as follows:

DELBERT BOYLE, father of David A. Boyle: $250,000.00;

WILMA BOYLE, mother of David A. Boyle: $250,000.00;

KAREN LYNN BOYLE, sister of David A. Boyle: $ 75,000.00;

JANICE BOYLE FREITAG, sister of David A. Boyle: $ 75,000.00;

and

TERRY LYNN BOYLE, sister of David A. Boyle: $ 75,000.00.

A TRUE COPY TESTE:

W. FARLEY POWERS, JR. Clerk

By: /s/ John W. Hawkins,
Deputy Clerk

Clerk–

W. FARLEY POWERS, JR., Clerk

(By) Deputy Clerk

/s/ John W. Hawkins,
Deputy Clerk

Date: July 24, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 85-2264

Delbert Boyle, personal representative of the Heirs and Estate of David A. Boyle, deceased,

Appellee,

versus

United Technologies Corporation,

Appellant,

and

Sikorsky Aircraft,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, District Judge. (C/A 84-486).

Argued: March 6, 1986 Decided: May 27, 1986

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

Lewis T. Booker (Lonnie D. Nunley, III; Hunton & Williams on brief) for Appellant; Louis S. Franecke (Mack, Hazlewood, Franecke & Tinney; James E. Moore; Staples, Greenberg, Minardi & Kessler on brief for Appellee).

PER CURIAM:

David Boyle drowned after the Marine helicopter he was flying crashed in the Atlantic Ocean. Boyle's father,

Delbert Boyle, on behalf of himself, Boyle's mother and three sisters sued the Sikorsky Division of United Technologies Corporation, hereinafter "Sikorsky"), the manufacturer of the helicopter. Boyle alleged negligence and breach of warranty in the design of the co-pilot's escape hatch and the rework of the helicopter's control system.

The jury found for plaintiffs. Sikorsky moved for a judgment notwithstanding the verdict, arguing that the military contractor defense shielded it from liability for the alleged design defect, and that plaintiffs had failed to establish Sikorsky's responsibility for the malfunction of the control system. The district judge denied Sikorsky's motion.

We reverse and remand with directions to enter judgment for defendant.

I.

On April 27, 1983, a Marine helicopter manufactured by Sikorsky (a CH-53) crashed in the ocean off the coast of Virginia Beach. The four crew members survived the impact. Three of them escaped through emergency exists, but the co-pilot, David Boyle, did not escape, and drowned.

At trial, plaintiffs attempted to show that Sikorsky had defectively repaired the pilot valve of the helicopter's servo. The servo acts at a sort of power steering to assist the pilot in flying the plane. After the accident, a small chip of wire was found in the pilot valve. Plaintiffs argued that the chip caused the servo to stop functioning, the pilot lost control of the helicopter, and the helicopter crashed into the water.

The metal chip could have been introduced at one of three times: when Sikorsky overhauled the helicopter in late 1981-early 1982; when the Navy reworked it in late 1982; or during maintenance of the hydraulic system by the marines. The parties agree that it is least likely that the servo was contaminated during maintenance. Plaintiffs contended at trial that the chip was most likely introduced by Sikorsky.

Plaintiffs also contended that Sikorsky had defectively designed the co-pilot's escape hatch. Specifically, plaintiffs alleged that when the collective, one of the control sticks, was pulled full up, it interfered with the co-pilot's access to his escape hatch.

The jury, in a general verdict, found for plaintiffs and awarded them $725,000. Because we believe the military contractor defense precludes any recovery for the design defect, and because there was insufficient evidence to conclude that Sikorsky was the party that introduced the chip, we reverse the decision below.

II.

A military contractor can escape liability for a design defect if it can demonstrate that 1) the United States is immune from liability; 2) the United States approved reasonably precise specifications for the equipment; 3) the equipment conformed to those specifications; and 4) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier

but not to the United States. *Tozer v. LTV Corp.*, No. 84-1907, slip op. (4th Cir. 1986).*

Sikorsky and the Navy worked together to prepare detailed specifications for the CH-53 helicopter. One of Sikorsky's program engineering managers for the CH-53 described in some detail the back-and-forth discussions between Sikorsky and the Navy. We have previously said that this type of exchange of information will normally suffice to establish government approval of the design in question. *See Tozer*, slip op at 13. In addition, Sikorsky built a mock-up of the cockpit with all the instruments and controls, including the collective stick and the emergency escape hatch. The Navy reviewed the mock-up and approved the design. As a result, Sikorsky has adequately demonstrated that the Navy approved reasonably detailed specifications for the escape hatch.

Sikorsky then built the helicopter, and in 1970 the Navy accepted it as fully complying with specifications. The Navy thus had thirteen years of experience with this particular helicopter at the time of Boyle's crash. Plaintiffs point to nothing in the record that indicates there were any hazards of which Sikorsky was aware and the Navy was not. Sikorsky's duty to warn the Navy of any hazards known to it but not to the Navy was thus not brought into question.

---

*_Tozer_ and its companion cases have all involved isolated incidents in the course of training exercises. We obviously have no occasion to address the governing considerations at a time of national emergency.

Because Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability for negligence or breach of warranty for the allegedly defective design of the escape hatch.

III.

We need not consider in this case the applicability of the military contractor defense to questions of manufacture and overhaul, because Sikorsky's liability can in no event be established. Even if the metal chip were the cause of Boyle's accident, plaintiffs must still show that defendant's defective rework introduced the chip, for the law of products liability in Virginia does not permit recovery where responsibility is conjectural. *Logan v. Montgomery Ward & Co., Inc.*, 219 S.E.2d 685 (Va. 1975).

Plaintiffs have failed to do more than speculate that Sikorsky introduced the metal chip into the pilot valve of the servo. It is true that when Sikorsky reworked the helicopter in late 1981-early 1982, it disassembled the servo. After the rework was complete, Sikorsky put a tamper seal of yellow paint on the valve. The yellow paint was undisturbed, suggesting that no one had removed the valve since the Sikorsky rework. However, when the Navy repaired the servo in late 1982, it removed the power piston, exposing the hydraulic system to contaminants, and creating the substantial possibility that when the piston was returned to the servo, the chip got into the valve from the unsealed underside.

The chip was made of carbon steel. The manager of product safety at Sikorsky testified that Sikorsky used only stainless steel, in order to prevent corrosion, and that it had no carbon steel in its inventory. Plaintiffs

argued that the size of carbon wire that formed the chip was so common that it would not have been listed in Sikorsky's inventory. Plaintiffs also introduced a Navy audit which said that wire of the type and size of the chip found in the servo was not used in the rework shop at the Pensacola Naval Air Rework facility. In response a Sikorsky representative at Pensacola testified that the Navy did have carbon steel in its inventory from at least July of 1982.

It remained plaintiffs' burden to prove that Sikorsky was responsible for the introduction of the chip into the pilot valve of the servo. Virginia products liability law is assiduous in conditioning liability upon responsibility. "Under either the warranty theory or the negligence theory the plaintiff must show . . . that the unreasonably dangerous condition existed when the goods left the defendant's hands." *Logan v. Montgomery Ward*, 219 S.E.2d at 687 (Va. 1975). It is well established that if there is more than one possible cause of an injury, the plaintiff must show that the defendant caused the injury:

> When there is substantial evidence introduced which tends to prove that plaintiff's injuries may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, such defendant is entitled to have the jury told that the plaintiff must fail if his evidence does not prove that his damages were produced by the negligence of defendant; and he must also fail if it appears from the evidence just as probable that damages were caused by one as by the other action because the plaintiff must make out his case by a preponderance of the evidence.

Cape Charles Flying Service, Inc. v. Nottingham, 47 S.E.2d 540, 544 (Va. 1948). *See also, Spurlin v. Richardson*, 128

S.E.2d 273, 277 (Va. 1962); *Sneed v. Sneed*, 244 S.E.2d 754, 755 (Va. 1978).

"The evidence in the instant case fails to eliminate the possibility that the blame attaches to some party other than" Sikorsky. *See Logan v. Montgomery Ward*, 219 S.E.2d at 688. Both Sikorsky and the Navy reworked the servo to an extent that would have permitted the chip to enter the pilo valve. Sikorsky and Boyle presented conflicting evidence on the presence of carbon steel in the rework shops at Sikorsky and Pensacola. "The evidence must prove more than a probability of negligence. A plaintiff must show why and how the incident happened. And if the cause of the event is left to conjecture, guess, or random judgment, the plaintiff cannot recover." *Town of West Point v. Evans*, 299 S.E.2d 349, 351 (Va. 1983). Defective rework by Sikorsky is by no means "the only reasonable inference that can be drawn to explain" the presence of the chip. *Logan v. Montgomery Ward*, 219 S.E.2d at 688. In *Logan*, the Virginia supreme Court declined to permit a jury to speculate whether defective manufacture or defective installation caused a gas range to explode. Here also, a defendant whose responsibility is not affixed with reasonable certainty is entitled to judgment as a matter of Virginia law.

REVERSED

Cite as 88 C.D.O.S. 4562

DELBERT BOYLE, Personal Representative of the Heirs and Estate of DAVID A. BOYLE, Deceased, Petitioner
v.

UNITED TECNOLOGIES CORPORATION.

No. 86-492
On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit
(792 F.2d 413)
Decided June 27, 1988

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.

I

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when the CH-53D helicopter in which he was flying crashed off the coast of Virginia Beach, Virginia, during a training exercise. Although Boyle survived the impact of the crash, he was unable to escape from the helicopter and drowned. Boyle's father, petitioner here, brought this diversity action in Federal District Court against the Sikorsky Divison of United Technologies Corporation (Sikorsky), which built the helicopter for the United States.

At trial, petitioner presented two theories of liability under Virginia tort law that were submitted to the jury. First, petitioner alleged that Sikorsky had defectively repaired a device called the servo in the helicopter's

automatic flight control system, which allegedly malfunctioned and caused the crash. Second, petitioner alleged that Sikorsky had defectively designed the copilot's emergency escape system: the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment. The jury returned a general verdict in favor of petitioner and awarded him $725,000. The District Court denied Sikorsky's motion for judgment notwithstanding the verdict.

The Court of Appeals reversed and remanded with directions that judgment be entered for Sikorsky. 792 F.2d 413 (CA4 1986). If found, as a matter of Virginia law, that Boyle had failed to meet his burden of demonstrating that the repair work performed by Sikorsky, as opposed to work that had been done by the Navy, was responsible for the alleged malfunction of the flight control system. *Id.*, at 415-416. It also found, as a matter of federal law, that Sikorsky could not be held liable for the allegedly defective design of the escape hatch because, on the evidence presented, it satisfied the requirements of the "military contractor defense," which the court had recognized the same day in *Tozer v. LTV Corp.*, 792 F.2d 403 (CA4 1986). 792 F.2d, at 414-415.

Petitioner sought review here, challenging the Court of Appeals' decision on three levels: First, petitioner contends that there is no justification in federal law for shielding government contractors from liability for design defects in military equipment. Second, he argues in the alternative that even if such a defense should exist, the Court of Appeals' formulation of the conditions for

its application is inappropriate. Finally, petitioner contends that the Court of Appeals erred in not remanding for a jury determination of whether the elements of the defense were met in this case. We granted certiorari, 479 U.S. 1029 (1986).

II

Petitioner's broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, see, *e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or a direct conflict between federal and state law, see, *e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines & Davidowitz*, 312 U.S. 52, 67 (1941). But we have held that a few areas, involving "uniquely federal interests," *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, be federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called "federal common law." See, *e.g.*, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-729 (1979); *Banco Nacional v. Sabbatino*, 376 U.S. 398, 426-427 (1964); *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-458 (1942).

The dispute in the present case borders upon two areas that we have found to involve such "uniquely federal interests." We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law. See, *e.g.*, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-594 (1973); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945); *Clearfield Trust, supra*. The present case does not involve an obligation to the United States under its contract, but rather liability to third persons. That liability may be styled one in tort, but it arises out of performance of the contract – and traditionally has been regarded as sufficiently related to the contract that until 1962 Virginia would generally allow design defect suits only by the purchaser and those in privity with the seller. See *General Bronze Corp. v. Kostopulos*, 203 Va. 66, 69-70, 122 S.E.2d 548, 551 (1961); see also Va. Code § 8.2-318 (1965) (eliminating privity requirement).

Another area that we have found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty. We have held in many contexts that the scope of that liability is controlled by federal law. See, *e.g.*, *Westfall v. Erwin*, 484 U.S. ___, ___ (1988); *Howard v. Lyons, supra*, at 597; *Barr v. Matteo*, 360 U.S. 564, 569-574 (1959) (plurality opinion); *id.*, at 577 (Black, J., concurring); see also *Yaselli v. Goff*, 12 F.2d 396 (CA2 1926), aff'd, 275 U.S. 503 (1927) (*per curiam*); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Bradley v. Fisher*, 13 Wall. 335 (1872). The present case involves an independent contractor performing its obligation under a procurement

contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done.[1]

We think the reasons for considering these closely related areas to be of "uniquely federal" interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts. We have come close to holding as much. In *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), we rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government. We said that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.*, at 20-21. The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.

Moreover, it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one – even though the dispute is

---

[1] The dissent misreads our discussion here to "intimat[e] that the immunity [of federal officials] . . . might extend . . . to nongovernment employees" such as a government contractor. *Post*, at 9. But we do not address this issue, as it is not before us. We cite these cases merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.

one between private parties. It is true that where "litigation is purely between private parties and does not touch the rights the duties of the United States," *Bank of American Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33 (1956), federal law does not govern. Thus, for example, in *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977), which involved the question whether certain private parties could sue as third-party beneficiaries to an agreement between a municipality and the Federal Aviation Administration, we found that state law was not displaced because "the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened" by allowing state law to determine whether thirty-party beneficiaries could sue, *id.*, at 30, and because "any federal interest in the outcome of the [dispute] before us '[was] far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.' " *Id.*, at 32-33, quoting *Parnell, supra*, at 33-34; see also *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 69 (1966).[2] But the same is not true here. The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

---

[2] As this language shows, the dissent is simply incorrect to describe *Miree* and other cases as declining to apply federal law despite the assertion of interests "comparable" to those before us here. *Pose*, at 8.

That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law.[3] Displacement will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," *Wallis, supra,* at 68, or the application of state law would "frustrate specific objectives" of federal legislation, *Kimbell Foods, supra,* at 728. The conflict with federal policy need not be as sharp at that which must exist for ordinary preemption when Congress legislates "in a field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230. Or to put the point differently, the fact that the area in question *is* one of unique federal concern changes what

---

[3] We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to "borro[w]" *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973), or "incorporat[e]" or "adopt" *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 729, 730 (1979), state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

would otherwise be a conflict that cannot produce pre-emption into one that can.[4] But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. See, *e.g.*, *Clearfield Trust*, 318 U.S., at 366-367 (rights and obligations of United States with respect to commercial paper must be governed by uniform federal rule.) In others, the conflict is more narrow, and only particular elements of state law are superseded. See, *e.g.*, *Little Lake Misere Land Co.*, 412 U.S., at 595 (even assuming state law should generally govern federal land acquisitions, particular state law at issue may not); *Howard v. Lyons*, *supra*, at 597 (state defamation law generally applicable to federal official, but federal privilege governs for statements made in the course of federal official's duties).

---

[4] Even before our landmark decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the distinctive federal interest in a particular field was used as a significant factor giving broad pre-emptive effect to federal legislation in that field:

"It cannot be doubted that both the state and the federal [alien registration laws belong 'to that class of laws which concern the exterior relation of this whole nation with other nations and governments.' Consequently the regulation of aliens is . . . intimately blended and intertwined with responsibilities of the national government. . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (citation omitted).

In *Miree, supra,* the suit was not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract. Rather, it was the contractual duty *itself* that the private plaintiff (as third party beneficiary) sought to enforce. Between *Miree* and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

The present case, however, is at the opposite extreme from *Miree.* Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). Even in this sort of situation, it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer

orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

In its search for the limiting principle to identify those situation in which a "significant conflict" with federal policy or interests does arise, the Court of Appeals, in the lead case upon which its opinion here relied, identified as the source of the conflict the *Feres* doctrine, under which the Federal Tort Claims Act does not cover injuries to armed service personnel in the course of military service. See *Feres v. United States*, 340 U.S. 135 (1950). Military contractor liability would conflict with this doctrine, the Fourth Circuit reasoned, since the increased cost of the contractor's tort liability would be added to the price of the contract, and "[s]uch pass-through costs would . . . defeat the purpose of the immunity for military accidents conferred upon the government itself." *Tozer*, 792 F.2d, at 408. Other courts upholding the defense have embraced similar reasoning. See, *e.g.*, *Bynum v. FMC Corp.*, 770 F.2d 556, 565-566 (CA5 1985); *Tillett v. J. I. Case Co.*, 765 F.2d 591, 596-597 (CA7 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (CA9 1983), cert. denied, 464 U.S. 1043 (1984). We do not adopt this analysis because it seems to us that the *Feres* doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the

Government contractor defense is to prohibit suit against the manufacturer whenever *Feres* would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock (in our example above), or by any standard equipment purchased by the Government, would be covered. Since *Feres* prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer – making inexplicable the three limiting criteria for contractor immunity (which we will discuss presently) that the Court of Appeals adopted. On the other hand, reliance on *Feres* produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter plans, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its figher planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the armed services.

There is, however, a statutory provision that demonstrates the potential for, and suggests the outlines of, "significant conflict" between federal interests and state law in the context of government procurement. In the Federal Tort Claims Act (FTCA), Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of

Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. 28 U.S.C. § 1346(b). It excepted from this consent to suit, however,

> "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including spedifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments, see *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In

sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.[5]

We agree with the scope of displacement adopted by the Fourth Circuit here, which is also that adopted by the Ninth Circuit, see *McKay v. Rockwell Int'l Corp., supra,* at 451. Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying

---

[5] The dissent's assumption that the outcome of this case would be different if it were brought under the Death on the High Seas Act, Act of Mar. 30, 1920, ch. 111, § 1 *et seq.*, 41 Stat. 537, codified at 46 U.S.C. § 761 *et seq.*, is not necessarily correct. That issue is not before us, and we think it inappropriate to decide it in order to refute (or, for that matter, to construct) an alleged inconsistency.

that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impeded them by cutting off information highly relevant to the discretionary decision.

We have considered the alternative formulation of the Government contractor defense, urged upon us by petitioner, which was adopted by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (1985), cert. pending, No. 85-1529. That would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design. While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the "discretionary function" exemption. The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

III

Petitioner raises two arguments regarding the Court of Appeals' application of the Government contractor defense to the facts of this case. First, he argues that since the formulation of the defense adopted by the Court of Appeals differed from the instructions given by the District Court to the jury, the Seventh Amendment guarantee of jury trial required a remand for trial on the new theory. We disagree. If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial. And that is so even though (as petitioner claims) respondent failed to object to jury instructions that expressed the defense differently, and in a fashion that would support a verdict. See *St. Louis v. Praprotnik*, 485 U.S. ___, ___ (1988) (plurality opinion of O'CONNOR, J., joined by THE CHIEF JUSTICE, WHITE and SCALIA, JJ.); *Ebker v. Tan Jay Int'l; Ltd.*, 739 F.2d 812, 825-826, n. 17 (CA2 1984) (Friendly, J.); 9 c. Wright & A. Miller, Federal Practice and Procedure § 2537, pp. 599-600 (1971).

It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what

petitioner asserts occurred, would be error, since whether the facts establish the conditions for the defense is a question for the jury. The critical language in the Court of Appeals' opinion was that "[b]ecause Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability or . . . the allegedly defective design of the escape hatch." 792 F.2d, at 415. Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that petitioner suggests, we cannot be certain from this language, and so we remand for clarification of this point. If the Court of Appeals was saying that no reasonable jury could find, under the principles it had announced and on the basis of the evidence presented, that the Government contractor defense was inapplicable, its judgment shall stand, since petitioner did not seek from us, nor did we grant, review of the sufficiency-of-the-evidence determination. If the Court of Appeals was not saying that, it should now undertake the proper sufficiency inquiry.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Lieutenant David A. Boyle died when the CH-53D helicopter he was copiloting spun out of control and plunged into the ocean. We may assume, for purposes of this case, that Lt. Boyle was trapped under water and drowned because respondent United Technologies negligently designed the helicopter's escape hatch. We may further assume that any competent engineer would have discovered and cured the defects, but that they inexplicably escaped respondent's notice. Had respondent designed such a death trap for a commercial firm, Lt. Boyle's family could sue under Virginia tort law and be compensated for his tragic and unnecessary death. But respondent designed the helicopter for the Federal Government, and that, the Court tells us today, makes all the difference: Respondent is immune from liability so long as it obtained approval of "reasonably precise specifications" –perhaps no more than a rubberstamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them.

If respondent's immunity "bore the legitimacy of having been prescribed by the people's elected representatives," we would be duty bound to implement their will, whether or not we approved. *United States v. Johnson*, 481 U.S. ___, ___ (1987) (dissenting opinion of SCALIA, J.). Congress, however, has remained silent – and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them

some defense.[1] The Court – unelected and unaccountable to the people – has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them. This time the injustice is of this Court's own making.

Worse yet, the injustice will extend far beyond the facts of this case, for the Court's newly discovered Government contractor defense is breathtakingly sweeping. It applies not only to military equipment like the CH-53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans – from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach. It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a Government building can invoke the defense when the elevator

---

[1] See, *e.g.* H.R. 4765, 99th Cong., 2d Sess. (1986) (limitations on civil liability of Government contractors); S. 2441, 99th Cong., 2d Sess. (1986) (same). See also H.R. 2378, 100th Cong., 1st Sess. (1987) (indemnification of civil liability for Government contractors); H.R. 5883, 98th Cong., 2d Sess. (1984) (same); H.R. 1504, 97th Cong., 1st Sess. (1981) (same); H.R. 5351, 96th Cong., 1st Sess. (1979) (same).

cable snaps or the walls collapse. And the defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dangerous, were "reasonably precise." *Ante*, at 11.

In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States of the coffers of industry. Because I would leave that exercise of legislative power to Congress, where our Constitution places it, I would reverse the Court of Appeals and reinstate petitioner's jury award.

I

Before our decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion rules of "general" federal common law. See, *e.g. Swift v. Tyson*, 16 Pet. 1 (1842). *Erie* renounced the prevailing scheme: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U.S., at 78. The Court explained that the expansive power that federal courts had theretofore exercised was an unconstitutional " 'invasion of the authority of the State and, to that extent, a denial of its independence.' " *Id.*, at 79 (citation omitted). Thus, *Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal

common law. See, *e.g. United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947).[2]

In proununcing that "[t]here is no federal general common law," 304 U.S., at 78, *Erie* put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). As the author of today's opinion for the Court pronounced for a unanimous Court just two months ago, " ' " 'we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " ' " *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. ___, ___ (1988) (citations omitted). Just as "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it," *id.*, at ___, federal common law cannot supersede state law *in vacuo* out of no more than an idiosyncratic determination by five Justices that a particular area is "uniquely federal."

Accordingly, we have emphasized that federal common law can displace state law in "few and restricted" instances. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

---

[2] Not all exercises of our power to fashion federal common law displace state law in the same way. For example, our recognition of federal causes of action based upon either the Constitution, *see e.g., Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), or a federal statute, see *Cort v. Ash*, 422 U.S. 66 (1975), supplements whatever rights state law might provide, and therefore does not implicate federalism concerns in the same way as does pre-emption of a state-law rule of decision or cause of action. Throughout this opinion I use the word "displace" in the latter sense.

"[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981). See also *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Miree v. DeKalb County*, 433 U.S. 25, 32 (1977). State laws "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966).

II

Congress has not decided to supersede state law here (if anything, it has decided not to, see n.1, *supra*) and the Court does not pretend that its newly manufactured "Government contractor defense" fits within any of the handful of "narrow areas," *Texas Industries, supra*, at 641, of "uniquely federal interests" in which we have heretofore done so, 451 U.S., at 640. Rather, the Court creates a new category of "uniquely federal interests" out of a synthesis of two whose origins predate *Erie* itself: the

interest in administering the "obligations to and rights of the United States under its contracts," *ante*, at 3, and the interest in regulating the "civil liability of federal officials for actions taken in the course of their duty," *ante*, at 4. This case is, however, simply a suit between two private parties. We have steadfastly declined to impose federal contract law on relationships that are collateral to a federal contract, or to extend the federal employee's immunity beyond federal employees. And the Court's ability to list two, or ten, inapplicable areas of "uniquely federal interest" does not support its conclusion that the liability of Government contractors is so "clear and substantial" an interest that this Court must step in lest state law does "major damage." *Yazell, supra*, at 352.

A

The proposition that federal common law continues to govern the "obligations to and rights of the United States under its contracts" is nearly as old as *Erie* itself. Federal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract, whether the contract entails procurement, see *Priebe & Sons v. United States*, 332 U.S. 407 (1947), a loan, see *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), a conveyance of property, see *Little Lake Misere*, 412 U.S., at 591-594, or a commercial instrument issued by the Government, see *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), or assigned to it, see *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457 (1942). Any such transaction necessarily "radiate[s] interests in transactions between private parties." *Bank of America Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33 (1956). But it is by now established that our power to

create federal common law controlling the *Federal Government's* contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts.

In *Miree v. DeKalb County, supra,* for example, the county was contractually obligated under a grant agreement with the Federal Aviation Administration (FAA) to " 'restrict the use of land adjacent to . . . the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.' " *Id.*, at 27 (citation omitted). At issue was whether the county breached its contractual obligation by operating a garbage dump adjacent to the airport, which allegedly attracted the swarm of birds that caused a plane crash, Federal common lalw would undoubtedly have controlled in any suit by the Federal Government to enforce the provision against the county or to collect damages for its violation. The diversity suit, however, was brought not by the Government, but by assorted private parties injured in some way by the accident. We observed that "the operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude," *id.*, at 30, and that "the United States has a substantial interest in regulating aircraft travel and promoting air travel safety," *id.*, at 31. Nevertheless, we held that state law should govern the claim because "only the rights of private litigants are at issue here," *id.*, at 30, and the claim against the county "will have *no direct effect upon the United States or its Treasury,*" *id.*, at 29 (emphasis added).

Miree relied heavily on *Parnell, supra,* and *Wallis,* 384 U.S. 63, the former involving commercial paper issued by the United States and the latter involving property rights in federal land. In the former case, Parnel cashed certain government bonds that had been stolen from their owner, a bank. It is beyond dispute that federal law would have governed the United States' duty to pay the value bonds upon presentation; we held as much in *Clearfield Trust, supra.* Cf. *Parnell, supra,* at 34. But the central issue in *Parnell,* a diversity suit, was whether the victim of the theft could recover the money paid to Parnell. That issue, we held, was governed by state law, because the "litigation [was] purely between private parties and [did] *not touch the rights and duties of the United States.*" 352 U.S., at 33 (emphasis added).

The same was true in *Wallis,* which also involved a Government contract – a lease issued by the United States to a private party under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.* (1982 ed. and Supp. III) – governed entirely by federal law. See 384 U.S., at 69. Again, the relationship at issue in this diversity case was collateral to the Government contract. It involved the validity of contractual arrangements between the lessee and other private parties, not between the lessee and the Federal Government. Even though a federal statute authorized certain assignments of lease rights, see *id.,* at 69, 70, and n. 8, and imposed certain conditions on their validity, see *id.,* at 70, we held that state law, not federal common law, governed their validity because application of state law would present "no significant threat to any identifiable federal policy or interest," *id.,* at 68.

Here, as in *Miree, Parnell,* and *Wallis,* a Government contract governed by federal common law looms in the background. But here, too, the United States is not a party to the suit and the suit neither "touch[es] the rights and duties of the United States," *Parnell, supra,* at 33, nor has a "direct effect upon the United States or its Treasury," *Miree, supra,* at 29. The relationship at issue is at best collateral to the Government contract.[3] We have no greater power to displace state law governing the collateral relationship in the Government procurement realm than we had to dictate federal rules governing equally collateral relationships in the areas of aviation, Government-issued commercial paper, or federal lands.

That the Government might "have to pay higher prices for what it orders if delivery in accordance with the contract exposes the seller to potential liability" *ante,* at 4, does not distinguish this case. Each of the cases just discussed declined to extend the reach of federal common law despite the assertion of comparable interests that would have affected the terms of the Government contract – whether its price or its substance – just as "directly" (or indirectly). *Ante,* at 6. Third-party beneficiaries can sue under a county's contract with the FAA, for example, even though – as the Court's focus on the

---

[3] True, in this case the collateral relationship is the relationship between victim and tortfeasor, rather than between contractors, but that distinction makes no difference. We long ago established that the principles governing application of federal common law in "contractual relations of the Government . . . are equally applicable . . . where the relations affected are noncontractual or tortius in character." *United States v. Standard Oil Co.,* 332 U.S. 301, 305 (1947).

absence of "*direct* effect on the United States or its Treasury," 433 U.S., at 29 (emphasis added), suggests – counties will likely pass on the costs to the Government in future contract negotiations. Similarly, we held that state law may govern the circumstances under which stolen federal bonds can be recovered, notwithstanding Parnell's argument that "the value of bonds to the first purchaser and hence their salability by the Government would be materially affected." Brief for Respondent Parnell in *Bank of America Nat'l Trust & Sav. Assn. v. Parnell*, O.T. 1956, No. 21, pp. 10-11. As in each of the cases declining to extend the traditional reach of federal law of contracts beyond the rights and duties of the *Federal Government*, "any federal interest in the outcome of the question before us 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.' " *Miree*, 433 U.S., at 32-33, quoting *Parnell*, 352 U.S., at 33-34.

B

Our "uniquely federal interest" in the tort liability of affiliates of the Federal Government is equally narrow. The immunity we have recognized has extended no further than a subset of "officials of the Federal Government" and has covered only "discretionary" functions within the scope of their legal authority. See *e.g. Westfall v. Erwin*, 484 U.S. ___ (1988); *Howard v. Lyons*, 360 U.S. 593 (1959); *Barr v. Matteo*, 360 U.S. 564, 571 (1959) (plurality); *Yaselli v. Goff*, 12 F.2d 396 (CA2 1926), aff'd, 275 U.S. 503 (1927) (*per curiam*); *Spalding v. Vilas*, 161 U.S. 483 (1896). Never before have we so much as intimated that the immunity (or the "uniquely federal interest" that justifies it) might extend beyond that narrow class to cover also

nongovernment employees whose authority to act is independent of any source of federal law and that are as far removed from the "functioning of the Federal Government" as is a Government contractor, *Howard, supra,* at 597.

The historical narrowness of the federal interest and the immunity is hardly accidental. A federal officer exercises statutory authority, which not only provides the necessary basis for the immunity in positive law, but also permits us confidently to presume that interference with the exercise of discretion undermines congressional will. In contrast, a Government contractor acts independently of any congressional enactment. Thus, immunity for a contractor lacks both the positive law basis and the presumption that if furthers congressional will.

Moreover, even within the category of congressionally authorized tasks, we have deliberately restricted the scope of immunity to circumstances in which "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens," *Doe v. McMillan,* 412 U.S. 306, 320 (1973); see *Barr, supra,* at 572-573, because immunity "contravenes the basic tenet that individuals be held accountable for their wrongful conduct," *Westfall, supra,* at ___. The extension of immunity to Government contractors skew the balance we have historically struck. On the one hand, whatever marginal effect contractor immunity might have on the "effective administration of policies of government," its "harm to individual citizens" is more severe than in the Government-employee context. Our observation that "there are . . . other sanctions than civil tort suits available to deter the executive official

who may be prone to exercise his functions in an unworthy and irresponsible manner," *Barr, supra,* at 576; see also *id.*, at 571, offers little deterence to the Government contractor. On the other hand, a grant of immunity to Government contractors could not advance "the fearless, vigorous, and effective administration of policies of government" nearly as much as does the current immunity for Government employees. *Id.*, 571. In the first place, the threat of a tort suit is less likely to influence the conduct of an industrial giant than that of a lone civil servant, particularly since the work of a civil servant is significantly less profitable, and significantly more likely to be the subject of a vindictive lawsuit. In fact, were we to take seriously the Court's assertion that contractors pass their costs – including presumably litigation costs – through, "substantially if not totally, to the United States," *ante,* at 10, the threat of a tort suit should have only marginal impact on the conduct of Government contractors. More importantly, inhibition of the Government official who actually sets Government policy presents a greater threat to the "administration of policies of government," than does inhibition of a private contractor, whose role is devoted largely to assessing the technological feasibility and cost of satisfying the Government's predetermined needs. Similarly, unlike tort suits against Government officials, tort suits against Government contractors would rarely "consume time and energies" that "would otherwise be devoted to governmental service." 360 U.S., at 571.

In short, because the essential jurstifications for official immunity do not support an extension to the Government contractor, it is no surprise that we have never extended it that far.

C

Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940), the sole case cited by the Court immunizing a Government contractor, is a slender reed on which to base so drastic a departure from precedent. In *Yearsley* we barred the suit of landowners against a private Government contractor alleging that its construction of a dam eroded their land without just compensation in violation of the Takings Clause of the Fifth Amendment. We relied in part on the observation that the plaintiffs failed to state a Fifth Amendment claim (since just compensation had never been requested, much less denied) and at any rate the cause of action lay against the Government, not the contractor. See *id.*, at 21 ("[T]he Government has impliedly promised to pay [the plaintiffs] compensation and has afforded a remedy for its recovery by a suit in the Court of Claims") (citations omitted). It is therefore unlikely that the Court intended *Yearsley* to extend anywhere beyond the takings context, and we have never applied it elsewhere.

Even if *Yearsley* were applicable beyond the unique context in which it arose, it would have little relevance here. The contractor's work "was done pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, . . . as authorized by an Act of Congress." *Id.*, at 19. See also

W.S. Ross Construction Co. v. Yearsley, 103 F.2d 589, 591 (CA8 1939) (undisputed allegation that contractor implemented "stabilized bank lines as set and defined by the Government Engineers in charge of this work for the Government") In other words, unlike respondent here, the contractor in *Yearsley* was following, not formulating, the Government's specifications, and (so far as is relevant here) followed them correctly. Had respondent merely manufactured the Ch-53D helicopter, following minutely the Government's own in-house specifications, it would be analogous to the contractor in *Yearsley*, although still not analytically identical since *Yearsley* depended upon an actual agency relationship with the Government, see 309 U.S., at 22 ("The action of the agent is 'the act of the government'") (citation omitted), which plainly was never estabished here. See, *e.g.*, *Bynum v. FMC Corp.*, 770 F.2d 556, 564 (CA5 1985). Cf. *United States v. New Mexico*, 455 U.S. 720, 735 (1982). But respondent's participation in the helicopter's design distinguishes this case from *Yearsley*, which has never been read to immunize the discretionary acts of those who perform service contracts for the Government.

III

In a valiant attempt to bridge the analytical canyon between what *Yearsley* said and what the Court wishes it had said, the Court invokes the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a). The Court does not suggest that the exception has any direct bearing here, for petitioner has sued a private manufacturer (not the Federal Government) under Virginia law (not the FTCA). Perhaps that is why respondent has three times disavowed any reliance

on the discretionary function exception, even after coaching by the Court,[4] as has the Government.[5]

---

[4] "QUESTION: [Would it be] a proper judicial function to craft the contours of the military contractor defense . . . even if there were no discretionary function exemption in the Federal Tort Claims Act?

"MR. LACOVARA: I think, yes . . . [I]t ought not to make a difference to the contractor, or to the courts, I would submit, whether or not the Government has a discretionary function exception under the Federal Tort Claims Act . . .

"QUESTION: I think your position would be the same if Congress had never waived its sovereign immunity in the Federal Torts Claims Act . . .

"MR LACOVARA: That's correct . . .

"QUESTION: Now wait. I really don't understand that. It seems to me you can make the argument that there should be preemption if Congress wanted it, but how are we to perceive that's what Congress wanted if in the Tort Claims Act, Congress had the said the Government itself should be liable for an ill designed helicopter? Why would we have any reason to think that Congress wanted to preempt liability of a private contractor for an ill designed helicopter?

". . . . . .

QUESTION: . . . [Y]our preemption argument, I want to be sure I understand it – does not depend at all on the Federal Tort Claims Act, as I understand it . . .

MR. LACOVARA: That's correct." Trans. of Oral Arg. 33-35 (re-augument Apr. 27, 1988).

[5] "QUESTION: Does the Government's position depend at all on the discretionary function exemption in the Federal Tort Claims Act?

"MR. AYER: Well, that's a hard question to answer . . . I think my answer to you is, no, ultimately it should not." *Id.*, at 40-41.

Notwithstanding these disclaimers, the Court invokes the exception, reasoning that federal common law must immunize Government contractors from state tort law to prevent erosion of the discretionary function exception's *policy* of foreclosing judicial " 'second-guessing' " of discretionary governmental decisions. *Ant*, at 10, quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). The erosion the Court fears apparently is rooted not in a concern that suits against Government contractors will prevent them from designing, or the Government from commissioning the design of, precisely the product the Government wants, but in the concern that such suits might preclude the Government from purchasing the desired product at the price it wants: "The financial burden of judgments against the contractors," the Court fears, "would ultimately be passed through, substantially if not totally, to the United States itself." *ante*, at 10.

Even granting the Court's factual premise, which is by no means self-evident, the Court cites no authority for the proposition the burdens imposed on Government contractors, but passed on to the Government, burden the Government in a way that justifies extension of its immunity. However substantial such indirect burdens may be, we have held in other contexts that they are legally irrelevant. See, *e.g. supra* at 6-7; *South Carolina v. Baker*, 485 U.S. ___ (1988) (our cases have "completely foreclosed any claim that the nondiscriminatory imposition of costs on private entities that pass them on to . . . the Federal Government unconstitutionally burdens . . . federal functions").

Moreover, the statutory basis on which the Court's rule of federal common law totters is more unstable than any we have ever adopted. In the first place, we rejected an analytically similar attempt to construct federal common law out of the FTCA when we held that the Government's waiver of sovereign immunity for the torts of its employees does not give the Government an implied right of indemnity from them, even though the "[t]he financial burden placed on the United States by the Tort Claims Act [could conceivably be] so great that government employees should be required to carry part of the burden." *United States v. Gilman*, 347 U.S. 507, 510 (1954). So too here, the FTCA's retention of sovereign immunity for the Government's discretionary acts does not imply a defense for the benefit of contractors who participate in those acts, even though they might pass on the financial burden to the United States. In either case, the most that can be said is that the position "asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position." *Id.*, at 511 (footnote omitted).

Here, even that much is an overstatement, for the Government's immunity for discretionary functions is not even "a product of" the FTCA. Before Congress enacted the FTCA (when sovereign immunity barred any tort suit against the Federal Government) we perceived no need for a rule of federal common law to reinforce the Governments's immunity by shielding also parties who might contractually pass costs on to it. Nor did we (or any other court of which I am aware) identify a special category of "discretionary" functions for which sovereign immunity

was so crucial that a government contractor who exercised discretion should share the Government's immunity from state tort law.[6]

Now, as before the FTCA's enactment, the Federal Government is immune from "[a]ny claim . . . based upon the exercise or performance [of] a discretionary function," including presumably any claims that petitioner might have brought against the Federal Government based upon respondent's negligent design of the helicopter in which Lt. Boyle died. There is no more reason for federal common law to shield contractors now that the Government is liable for some torts than there was when the Government was liable for none. The discretionary function exception does not support an immunity for the discretionary acts of Government *contractors* any more than the exception for "[a]ny claim [against the government] arising out of assault," § 2680(h), supports a personal immunity for Government employees who commit assaults, Cf. *Sheridan v. United States*, 487 U.S. ___, ___ (1988) (slip op. 7-8). In short, while the Court purports to divine whether Congress would object to this suit, it inexplicably begins and ends its sortilege with an exception to a statute that is itself inapplicable and whose repeal would leave unchanged every relationship remotely relevant to the accident underlying this suit.

Far more indicative of Congress' views on the subject is the wrongful-death cause of action that congress itself

---

[6] Some States, or course, would not have permitted a stranger to the contract to bring such a tort suit at all, but no one suggested that this rule of state tort law was compelled by federal law.

has provided under the Death on the High Seas Act (DOHSA), Act of Mar. 30, 1920, ch. 111, § 1 *et seq.*, 41 Stat. 537, codified at 46 U.S.C. § 761 *et seq.* – a cause of action that could have been asserted against United Technologies had Lt. Boyle's helicopter crashed a mere three miles further off the coast of Virginia Beach. It is beyond me how a state-law tort suit against the designer of a military helicopter could be said to present any conflict, much less a " 'significant conflict,' " with "federal interests . . . in the context of government procurement," *ante*, at 10, when federal law itself would provide a tort suit, but no (at least no explicit) Government-contractor defense,[7] against the same designer for an accident involving the same equipment. See Pet. for Cert. in *Sikorsky Aircraft Division, United Technologies Corp. v. Kloss*, O.T. 1987, No. 87-1633, pp. 3-6 (trial court holds that family of marine can bring a wrongful-death cause of action under the DOSHA against United Technologies for the negligent design of a United States Marine Corps CH-53D helicopter in which he was killed when it crashed 21 miles offshore), cert. denied, 486 U.S. ___ (1988).

IV

At bottom, the Court's analysis is premised on the proposition that any tort liability indirectly absorbed by

---

[7] But cf. *Tozer v. LTV Corp.*, 792 F.2d 403 (CA4 1986) (applying defense in DOHSA case), cert. pending, No. 86-674; *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (CA11 1985) (same) cert. pending, No. 85-1529; *Koutsoubos v. Boeing Vertol, Division of Boeing Co.*, 775 F.2d 352 (CA3) (same), cert. denied, 474 U.S. 821 (1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (CA9 1983) (same), cert. denied, 464 U.S. 1043 (1984).

the Government so burdens governmental functions as to compel us to act when Congress has not. That proposition is by no means uncontroversial. The tort system is premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention. If the system is working as it should, Government contractors will design equipment to avoid certain injuries (like the deaths of soldiers of Government employees), which would be certain to burden the Government. The Court therefore has no basis for its assumption that tort liability will result in a net burden on the Government (let alone a clearly excessive net burden) rather than a net gain.

Perhaps tort liability is an inefficient means of ensuring the quality of design efforts, but "[w]hatever the merits of the policy" the Court wishes to implement, "its conversion into law is a proper subject for congressional action, not for any creative power of ours." *Standard Oil*, 332 U.S., at 314-315. It is, after all, "Congress, not this Court or the other federal courts, [that] is the custodian of the national purse. By the same token [Congress] is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the Government against financial losses *however inflicted*. . . ." *Ibid.* (emphasis added). See also *Gilman*, 347 U.S., at 510-512. If Congress shared the Court's assumptions and conclusion it could readily enact "A BILL To place limitations on the civil liability of government contractors to ensure that such liability does not impede the ability of the United States to procure necessary goods and services," H.R. 4765, 99th Cong. 2d

Sess. (1986); see also S. 2441, 99th Cong., 2d Sess. (1986). It has not.

Were I a legislator, I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the unsupported speculation that their liability might ultimately burden the United States Treasury. Some of my colleagues here would evidently vote otherwise (as they have here), but that should not matter here. We are judges not legislators, and the vote is not ours to cast.

I respectfully dissent.

JUSTICE STEVENS, dissenting.

When judges are asked to embark on a lawmaking venture, I believe thay should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand. There are instances of so-called interstitial lawmaking that inevitably become part of the judicial process.[1] But when we are asked to create an entirely new

---

[1] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*" *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

doctrine – to answer "questions of policy on which Congress has not spoken," *United States v. Gilman*, 347 U.S. 507, 511 (1954) – we have a special duty to identify the proper decisionmaker before trying to make the proper decision.

When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual – whether in the social welfare context, the civil service context, or the military procurement context – I feel very deeply that we should defer to the expertise of the Congress. That is the central message of the unanimous decision in *Bush v. Lucas*, 462 U.S. 367 (1983);[2] that is why I joined the majority in *Schweiker v. Chilicky*, ___ U.S. ___ (1988),[3] a case decided only three days ago; and that is why I am so distressed by the majority's decision today. For in this case, as in *United States v. Gilman, supra:* "the selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That

---

[2] "[W]e decline to create a new substantive legal liability without legislative aid and as at the common law, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." 462 U.S., at 390 (internal quotation omitted).

[3] "Congressional competence at 'balancing governmental efficiency and the rights of [individuals],' *Bush*, 462 U.S., at 389, is no more questionable in the social welfare context than it is in the civil service context. Cf. *Forrester v. White*, 484 U.S. ___, ___ (1988) [slip op. 3-4]." ___ U.S., at ___.

function is more appropriately for those who write the laws, rather than for those who interpret them." 347 U.S., at 511-513.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
(UNPUBLISHED)

No. 85-2264

DELBERT BOYLE, personal representative of the Heirs and Estate of David A. Boyle, deceased,

Appellee,

versus

UNITED TECHNOLOGIES CORPORATION,

Appellant,

and

SIKORSKY AIRCRAFT,

Defendant.

On Remand from the Supreme Court of the United States. (Docket No. 86-492).

Decided: August 3, 1988

Before RUSSELL, HALL, and WILKINSON, Circuit Judges.

Lewis T. Booker (Lonnie D. Nunley, III; HUNTON & WILLIAMS on brief) for Appellant; Louis S. Franecke, MACK, HAZLEWOOD, FRANECKE & TINNEY (James E. Moore; STAPLES, GREENBERG, MINARDI & KESSLER; Michael Moore, CARTWRIGHT, SUCHERMAN & SLOBODIN, INC., on brief) for Appellee.

PER CURIAM:

Our prior panel opinion in this case, *Boyle v. United Technologies Corp.*, 792 f.2d 413 (4th Cir. 1986) held that an action by plaintiff Delbert Boyle against the Sikorsky Division of United Technologies Corp. (hereinafter "Sikorsky") alleging defective design in a military helicopter was barred by the federal military contractor's defense. The defense, which we recognized in *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), precluded liability on the part of a military contractor for design defects where 1) the United States is immune from liability; 2) the United States approved reasonably precise specifications for the equipment; 3) the equipment conformed to those specifications; and 4) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States. On this basis we held that Sikorsky could incur no liability for the alleged defect in its design of the helicopter.

The Supreme Court granted certiorari; 479 U.S. 1029 (1986). In an opinion issued June 27, 1988, the Court upheld the formulation of the contractor defense on which we based our ruling that Sikorsky could not be held liable. *See Boyle v. United Technologies Corp.*, 56 U.S.L.W. 4792 (U.S. June 27, 1988). The Court also rejected the petitioner's argument that a remand was necessary in this case because our formulation of the defense differed from that given in the district court's instructions to the jury. *Id.* at 4796.

The Court has remanded to us for clarification of one aspect of our earlier opinion. the language in our opinion

on which the Court seeks clarification is as follows: "Because Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability for . . . the allegedly defective design of the escape hatch." 792 F.2d at 415. The Supreme Court stated:

> It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what petitioner asserts occurred, would be error, since whether the facts establish the conditions for the defense is a question for the jury. . . . Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that petitioner suggests, we cannot be certain from this language, and so we remand for clarification of this point.

56 U.S.L.W. at 4796.

As the Supreme Court suggested, the language in question was intended to express our holding that no reasonable jury could have found for the plaintiff on the facts presented. It is clear in this case that the military contractor defense was established as a matter of law. Our reasons for this holding are set forth in the panel opinion. *See* 792 F.2d at 414-15.

Appellee's motion for additional briefing and argument in this case is denied. We remand the case to the district court with instructions that judgment be entered in favor of the defendant.

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-677

IN THE

Supreme Court of the United States

October Term, 1988

DELBERT BOYLE,
PERSONAL REPRESENTATIVE OF THE
HEIRS AND ESTATE OF
DAVID A. BOYLE, DECEASED,

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LEWIS T. BOOKER
LONNIE D. NUNLEY, III
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

Counsel for United Technologies Corporation

November 21, 1988

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	2
A. The Defective Flight Control System ..	3
B. The Defective Escape System.....	4
II. REASONS FOR DENYING THE WRIT .	5
A. The Petition Raises Issues Previously Decided By This Court.....	5
B. The Petition Raises Issues Which Should Have Been Raised, If At All, In The Course of The First Appeal	8
C. The Court Of Appeals Properly Responded To The Question Put To It By This Court Upon Remand	9
III. CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Boyle v. United Technologies Corporation, 792 F.2d 413, remanded for clarification, ___ U.S. ___ , 108 S. Ct. 2510 (1988).....	2, 5, 8
McGonigal v. Gearhart Industries, 851 F.2d 774 (5th Cir. 1988)	6
Neely v. Eby Construction Company, 386 U.S. 317 (1967)	6
United States v. Geneves, 405 U.S. 93 (1972) .	6

Other Authorities

Rule 51, United States Supreme Court	7
Seventh Amendment, United States Constitution.....	6

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-677

DELBERT BOYLE,
PERSONAL REPRESENTATIVE OF THE HEIRS
AND ESTATE OF
DAVID A. BOYLE, DECEASED,

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent United Technologies Corporation (UTC)* respectfully requests that this Court deny the petition for writ of certiorari seeking review of the August 3, 1988, opinion of the United States Court of Appeals for the Fourth Circuit in this case upon remand. Three reasons compel denial.

First, certain questions presented for review raise matters which should have been raised, if further review or clarification was needed, by petition for rehearing to

---

* The listing of related corporations required by Rule 28.1 of this Court which accompanied the Brief for United Technologies Corporation filed on May 21, 1987, is still accurate.

this Court following this Court's June 27, 1988, opinion. It is far too late now to seek a rehearing in the guise of a petition for writ of certiorari.

Second, certain other questions presented raise issues for the first time, issues not pertinent to this appeal but instead issues which should have been raised, if at all, in the original petition to this Court. Finally, to the extent that the petition asserts error as to the ruling of the Court of Appeals for the Fourth Circuit made after remand, the decision of the Court of Appeals was plainly correct and should not be disturbed.

I.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to the Court of Appeals for the Fourth Circuit to review that court's August 3, 1988, decision of this case upon remand. Petitioner also asserts at page 1 of the petition that he seeks review of the May 27, 1986, decision of the Court of Appeals, the decision upon which this Court has already heard argument twice. The petition cannot properly be for a writ to review the opinion of the Fourth Circuit in *Boyle v. United Technologies Corporation*, 792 F.2d 413 (1986), the original opinion in this case, even though the statement of the case set out by petitioner purports to be primarily addressed to perceived errors in that opinion.

Upon remand the issue this Court put to the Fourth Circuit was precise:

> . . . . Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that petitioner suggests, we cannot be certain from this language, and so we remand for clarification of this point. If the

> Court of Appeals was saying that no reasonable jury could find, under the principles it had announced and on the basis of the evidence presented, that the Government contractor defense was inapplicable, its judgment shall stand, since petitioner did not seek from us, nor did we grant, review of the sufficiency-of-the-evidence determination. If the Court of Appeals was not saying that, it should now undertake the proper sufficiency inquiry.

___ U.S. ___ , 108 S. Ct. 2510, 2519 (1988).

The Court of Appeals forthrightly answered the question put to it in its unpublished opinion of August 3, 1988, reprinted at pages A49-51 of the petition, at page 51:

> As the Supreme Court suggested, the language in question was intended to express our holding that no reasonable jury could have found for the plaintiff on the facts presented. It is clear in this case that the military contractor defense was established as a matter of law.

In light of that clarification, the Court of Appeals, following this Court's mandate, directed that judgment be entered for UTC. That clearly ended the matter. Nevertheless, without waiving its position that the only issue before the Court on this petition is whether the Fourth Circuit properly responded to the inquiry of this Court, UTC does address specific factual contentions made in the petition.

A. *The Defective Flight Control System.* Petitioner again contends that the evidence at the trial established that there were defects in the design of the automatic flight control system (AFCS) and that it did not conform to the Navy specifications. The problem with raising that issue now is that the trial court did not submit any

alleged defects in the flight control system to the jury. Petitioner took no exception to the trial court's refusal to charge the jury on defects in the flight control system. Before charging the jury, Judge Richard L. Williams of the United States District Court for the Eastern District of Virginia told counsel (J.A. 442, 443):**

> Now, on the manfacture, other than the design, on the design characteristics of it, I am letting that go [to the jury] on the location of the collective stick and the handle for the emergency exit.
>
> The other thing I am really letting go to the jury is the re-manufacture of the servo and not the original manufacture. . . .

The trial court charged the jury (J.A. 458-459):

> In this case the plaintiff claims the defendant was negligent in its design of the copilot's egress system and/or the re-working of the Moog valve of the AFCS servo and that one or both of these negligent acts was the proximate cause of the death of David Boyle.

Petitioner now seeks indirectly to raise the decision of the trial court not to give an instruction on a defect in the design of the AFCS as a justification for granting a writ of certiorari. Petitioner never raised that issue in the Court of Appeals, the original petition for writ of certiorari or in either the first or second round of briefs to this Court.

B. *The Defective Escape System.* Petitioner assumes in the petition as a conclusion what was instead a disputed issue of fact at the trial. Petitioner states unequivocally that the copilot's escape system was de-

---

** J.A. refers to the joint appendix prepared by the parties for the prior argument of this case in this Court.

fective and that UTC failed to point that defect out to the Navy. The evidence showed exactly to the contrary. UTC designed the escape hatch to be jettisonable outward. Petitioner's expert contended that it should have been jettisonable inward. The Navy itself had specified that the escape hatch be jettisonable, not only for the helicopter involved in this accident but for all Navy helicopters (DX 11; J.A. 492). That has universally been interpreted in the design of military helicopters as a requirement that the hatch fall outward.

Even more pertinent to this case, the evidence established without contradiction that there was no defect at all in the emergency escape hatch system which could possibly have caused or contributed to Lieutenant Boyle's death. Captain Burt Tussing, the pilot of the helicopter, was sitting directly opposite Lieutenant Boyle. When the helicopter entered the water Captain Tussing pushed his escape hatch out against the water, even though the helicopter was rolling in the water, and his hatch was almost entirely submerged. He pulled the escape hatch knob, the hatch fell out, and he escaped the helicopter safely (J.A. 122-23). On the other hand, Lieutenant Boyle did not attempt to use his escape hatch. The escape hatch knob included a light shear wire designed to demonstrate whether the hatch had been opened. After the accident an examination showed that the shear wire had not been disturbed, demonstrating that Lieutenant Boyle had made no attempt to use his escape hatch (Stipulation of Facts, page 2).

II.

REASONS FOR DENYING THE WRIT

A.

The Petition Raises Issues Previously Decided By This Court

The petition presents ten questions for review. Six of them, Questions 1, 3, 5, 6, 7 and 8, relate either to issues this Court decided in its June 27, 1988, opinion or issues as to which Petitioner raised no controversy before this Court at the time of the first appeal.

Question 1 contends that there is confusion in the circuits as to the proper factual tests of the government contractor defense. However this Court was very explicit in its opinion in setting out the three factual tests:

> . . . . Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States.

____ U.S. ____ ; 108 S. Ct. 2510, 2518 (1988).

No common law appellate court sets out in a vacuum what explicit facts warrant recovery under a legal theory, whether contract, tort or otherwise. An appellate court states general principles; it then becomes the responsibility of the individual court or jury in a specific case to apply the facts found in a particular case to the principles announced. The suggestion that this Court's formulation of the elements of the government contractor defense has left confusion in the circuits is nonsense.

Only one Court of Appeals has had occasion to apply that aspect of this Court's opinion which relates to the government contractor defense since it was announced. In *McGonigal v. Gearhart Industries*, 851 F.2d 774 (5th Cir. 1988), that court correctly found, consistent with this Court's decision, that the defense related to design defects, not manufacturing defects. Any confusion in the circuits which may have been perceived to exist prior to this Court's decision has been resolved by that decision.

Questions 3 and 5 raise identical contentions. Petitioner argues that the Fourth Circuit had no right to ignore conflicts in the evidence or to depart from an accepted and usual course of judicial proceedings by setting aside a jury verdict. Baldly stated, petitioner argues that no trial court after verdict, and no appellate court upon review, can ever set aside a verdict without violating the Seventh Amendment to the United States Constitution. This Court has rejected that contention time and again; in *Neely v. Eby Construction Company*, 386 U.S. 317 (1967) this Court said, at page 322:

> . . . . As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* [citation omitted].

Accord, *United States v. Geneves*, 405 U.S. 93, 106 (1972).

Question 6 contends that this Court should grant a writ to establish where the burden of proof lies in a government contractor defense case, a complete non-issue. That has never been an issue in this case. The trial court

charged the jury that the burden of proof on the government contractor defense lay with the party asserting it:

> In addition, the plaintiff cannot recover under either a theory of negligence or breach of implied warranty based upon a design defect if defendant, U.T.C., proves by a preponderance of the evidence these three things. One, that the United States Navy established or approved the specification for the co-pilot egress system; two, that the helicopter conformed to the specification; and three, that the United States Navy knew as much or more than the defendant about the helicopter's hazards and therefore defendant did not need to warn the government of the dangers involved in the use of the equipment. (J.A. 461).

UTC took no exception to this allocation of the burden of proof in the trial court and assigned no error to the allocation of the burden of proof either in the Court of Appeals or in this Court. To suggest that a petition should be granted to determine where the burden of proof lies ignores the well established law of the case.

This Court's June 27, 1988, opinion is clear and without ambiguity. If ambiguity were present, the time to have raised that issue was in a timely petition for rehearing. No such petition was ever filed. Rule 51 of the Supreme Court Rules specifies that a petition for rehearing must be filed within 25 days unless the time is extended by the Court. Having chosen not to seek a rehearing but to pursue his remedies upon remand to the Fourth Circuit, the petitioner cannot now complain about issues decided in this Court's June 27, 1988, opinion.

B.

The Petition Raises Issues Which Should Have Been Raised, If At All, In The Course Of The First Appeal

In its 1986 decision the Fourth Circuit made it clear that UTC had introduced sufficient evidence to meet the tests of the government contractor defense:

> Because Sikorsky [UTC] has satisfied the requirements of the military contractor defense, it can incur no liability for negligence or breach of warranty for the allegedly defective design of the escape hatch. 792 F.2d 413, 415.

Petitioner contends in Questions 3, 5, 6, 9 and 10 that there was sufficient evidence to support the jury verdict despite the evidence introduced by UTC to establish its compliance with the government contractor defense. To put it another way, petitioner says now that there was sufficient evidence that UTC did not meet the standards of the government contractor defense so that the Fourth Circuit was wrong in its 1986 opinion when it found that UTC had established the defense. Issues as to the sufficiency of the evidence were not before this Court when the matter was originally briefed and argued. Such issues cannot now be brought before the Court under the guise of a petition addressed to the August 3, 1988, decision of the Court of Appeals. In fact, this Court explicitly recognized that at the time of the first appeal to this Court the petitioner did not seek, nor did this Court grant, a review on the sufficiency of the evidence determination by the Fourth Circuit. ____ U.S. ____ , 108 S. Ct. 2510, 2519 (1988).

Had petitioner thought that UTC had not shown sufficient facts to establish its compliance with the government contractor defense he should have sought re-

view of that issue in his original petition to this Court. Having chosen not to do so then, he cannot raise that issue now.

C.

THE COURT OF APPEALS PROPERLY RESPONDED TO THE QUESTION PUT TO IT BY THIS COURT UPON REMAND

Petitioner grossly misstates this Court's directions to the Court of Appeals. Petitioner contends in Question 2 that this case was remanded for the Fourth Circuit to make a "factual evaluation" of the government contractor defense. This Court gave no such direction to the Court of Appeals.

The question in this case on remand was starkly simple: Did the Fourth Circuit decide, using principles appellate courts have always used, that no reasonable jury could find that UTC had failed to establish all the factual elements needed for the government contractor defense? If it did, that ends the matter, and its judgment stands. Alternatively, did the Fourth Circuit, sitting as an independent trier of the fact, weigh the evidence and then conclude, on its own, from its independent review of the evidence, that the defense was made out? The latter would have been error.

The Fourth Circuit did not hesitate in its response. It explained that its prior holding was based upon its finding that no reasonable jury could have found on the facts presented any way other than that UTC had established the government contractor defense. That did not involve an evaluation of the evidence. It involved only the Fourth Circuit's affirmation that it had found that the uncontroverted evidence introduced by UTC established the government contractor defense as a matter of law. The Court of Appeals affirmed that was precisely what it had done. The Fourth Circuit then did no more than

appellate courts typically do when faced with a case where the evidence does not support the verdict—it directed a motion for judgment notwithstanding the verdict.

III.

CONCLUSION

This case was remanded to the Fourth Circuit for clarification of its 1986 opinion only because petitioner himself had previously raised questions as to the basis for the Fourth Circuit's opinion. While this Court thought those questions were "doubtful," it nevertheless gave petitioner the benefit of every doubt and remanded the case to the Fourth Circuit for clarification. The Fourth Circuit has now clarified its opinion. There is nothing further to review, and the writ should be denied.

Respectfully submitted,

LEWIS T. BOOKER
LONNIE D. NUNLEY, III
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, VA 23212
(804) 788-8200